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v.
Roger Biard

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for the Ninth Circuit

Counsel for petitioner: Kester,John G.

Counsel for respondent: Walsh,Thomas C.

Entry	Date	Note	Proceedings and Orders
1	Aug 27 1987	G	Petition for writ of certiorari filed.
3	Sep 25 1987		Order extending time to file response to petition until October 15, 1987.
4	Oct 15 1987		Brief of respondent Roger Biard in opposition filed.
5	Oct 20 1987	X	Reply brief of petitioner Wilfried Van Cauwenberghe filed.
6	Oct 21 1987		DISTRIBUTED. November 6, 1987
7	Nov 9 1987		Petition GRANTED.
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9	Dec 11 1987		Order extending time to file brief of petitioner on the merits until January 8, 1988.
10	Jan 8 1988		Joint appendix filed.
11	Jan 8 1988		Brief of petitioner Wilfried Van Cauwenberghe filed.
13	Jan 14 1988		Record filed.
		*	Certified record and C.A. proceedings and appendix of USCA, 2 volumes, and USDC record, received. (Box).
12	Jan 19 1988		Record filed.
		*	Certified copy of original record and USDC proceedings, 5 volumes, received.
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16	Feb 5 1988		SET FOR ARGUMENT, Monday, March 21, 1988. (4th case).
17	Feb 18 1988		Brief of respondent Roger Biard filed.
19	Feb 23 1988		CIRCULATED.
20	Mar 4 1988	X	Reply brief of petitioner Wilfried Van Cauwenberghe filed.
21	Mar 21 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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87-336

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a district court's order denying a motion to dismiss on grounds of *forum non conveniens* appealable to the court of appeals under 28 U.S.C. § 1291 and the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

2. Is a district court's order denying an extradited person's claim of absolute immunity from civil process appealable to the court of appeals under 28 U.S.C. § 1291, *Cohen*, and *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ——

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 7, 1987.

OPINIONS BELOW

The order of the Court of Appeals dismissing petitioner's appeal is at Appendix A, p. 1a, *infra*. The order of the District Court denying petitioner's motion seeking dismissal based upon absolute immunity and *forum non conveniens* is at Appendix B, p. 2a, *infra*. Both are unreported.

JURISDICTION

The order of the United States District Court for the Central District of California deny.ng Petitioner's claims

of *forum non conveniens* and absolute immunity was entered on November 17, 1986. A timely notice of appeal was filed on December 15, 1986. The judgment of the United States Court of Appeals for the Ninth Circuit was entered July 7, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. § 1291 provides in relevant part:

> "Final decisions of district courts
>
> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

STATEMENT

This petition presents two plain issues of law: whether orders denying claims of *forum non conveniens* and civil immunity are appealable under 28 U.S.C. § 1291.

This is a civil suit brought by one Belgian against another in the United States District Court for the Central District of California. Petitioner, for thirty years a real estate broker in Brussels, was sued by respondent, a Brussels neighbor who owns a brokerage house, for fraud and breach of contract, with a count under the civil RICO statute, 18 U.S.C. § 1964. Petitioner moved to dismiss the suit on the grounds of *forum non conveniens*, contending with supporting affidavits that the parties should litigate in their home country. The motion was summarily denied by the District Court, and petitioner's appeal of that denial order was dismissed by the Court of Appeals for lack of jurisdiction.

Petitioner also moved to dismiss in the District Court on the ground of absolute immunity from civil suit in this country. Petitioner was present in Los Angeles solely as a result of an extradition proceeding that had brought him there. He had been arrested while on a business trip in Geneva, Switzerland, at the request of United States officials acting under authority of the extradition treaty with Switzerland. Treaty between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, 32 Stat. 1928. After legal proceedings in the Swiss courts he was extradited and, pursuant to the treaty, delivered to Los Angeles by United States Marshals. The District Court summarily denied the claim of civil immunity also, and on appeal the Court of Appeals in the same order again dismissed for lack of jurisdiction.

In more detail, the underlying facts are these; except as concerned the parties' state of mind, they were virtually undisputed. Petitioner in 1979 had introduced respondent in Los Angeles to an American, one Alan Blair, to whose partnership respondent lent $1,000,000 for three years at 20% per annum interest for investment in real estate near Kansas City. Only $800,000 of the $1,000,000 was repaid, and respondent claimed to have been misled as to the security for the loan. Soon after the default, respondent filed a complaint against Blair in Switzerland, where the funds had passed. That complaint made no mention whatsoever of petitioner. After investigation the Swiss judge declined to take any action. Respondent then retained U.S. counsel, who contacted U.S. prosecutors; this time respondent added an allegation that petitioner had been culpable because he had introduced respondent to Blair and assisted Blair in transferring the loan amount. This resulted in the U.S. indictment in the Central District of California, charging Blair, another American, and petitioner with wire fraud and with causing interstate transportation of a victim of fraud (18 U.S.C. §§ 1343 and 2314). Petitioner's extradition to the United States followed.

Although the trial judge in the criminal proceeding expressed doubt concerning the prosecution's theory that petitioner had been a partner of Blair's, nevertheless all defendants were convicted of one count of wire fraud and one count of causing interstate transportation of a victim of fraud.[1] Petitioner was sentenced only to the time he had already served in pretrial confinement, was ordered to pay respondent restitution of $34,501.26, and was placed on probation.

A few days later, when petitioner arrived at the office of his probation officer for a scheduled appointment, he was handed the summons and complaint in the present case, seeking in excess of $19,000,000 in compensatory and punitive damages.[2] Petitioner by special appearance moved to dismiss on the ground that as a person brought to the United States solely by extradition, he was absolutely immune from civil process; he cited a number of cases that had recognized such immunity. In addition, petitioner moved to dismiss the complaint for *forum non conveniens*. Citing *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), he pointed out with supporting affidavits that the courts were open in Brussels, their mutual home, that

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[1] The trial judge in the criminal case declined to set aside the jury's verdict, commenting of petitioner that " I know he's a nice man, he never has been in trouble" and that "he had an excellent reputation and character but they still came in with a conviction." The conviction was affirmed except as to a requirement that petitioner remain in the United States. *United States* v. *Van Cauwenberghe*, 814 F.2d 1329 (9th Cir. 1987), *petition for rehearing pending*.

[2] Also named as defendants were Blair and the other American, their limited real estate partnership, and Blair's wife, a Belgian. Two of those defendants were never served, one defaulted, and summary judgment was entered.

events and most witnesses were in Europe, and that although respondent had brought complaints in Switzerland and the United States, respondent had never taken any action to sue in Belgium, where both resided.[3]

Supporting the motion, petition submitted extensive affidavits, not disputed, that both petitioner and respondent were native speakers of French, and that petitioner's knowledge of English was extremely limited; that the criminal trial had required extensive assistance of translators, both for French and for Flemish; and that conversations in which he had allegedly recommended Blair to respondent had occurred in French in Brussels. Witnesses were Belgians or French-speaking Swiss, all of them beyond the process of the court in Los Angeles. Affidavits pointed out that the majority of the witnesses at the criminal trial had been Europeans,[4] and listed by name the witnesses petitioner would seek to call at a civil trial. Of the witnesses to the events, 7 were Belgians (one resident in Great Britain) and the other 4 were Swiss. In addition, of his 14 character witnesses, all of whom submitted supporting letters, all were Belgians. Petitioner argued further that nuances and customs of Belgians in mutual business dealings would be alien to a California jury, as would be the norms of Belgian commercial practices.[5]

The civil case was not assigned to the district judge who had conducted the criminal trial. The new judge at

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[3] Respondent acknowledged in his testimony that he could sue in Brussels.

[4] All five of his defense witnesses were Belgians, three of them requiring assistance of translators. All three of the principal prosecution witnesses were Belgian or Swiss. Many exhibits were documents written in French or Flemish.

[5] There had been testimony to the Los Angeles jury in the criminal trial, for example, concerning what significance to attribute to use in a Belgian business conversation in French of the familiar second-person pronoun "*tu*" instead of the more formal "*vous*."

first ordered petitioner's motion set for hearing, but then *sua sponte* ordered it off the hearing calendar. Petitioner requested a hearing. But the District Court entered an order that without any stated reasons summarily rejected petitioner's claim of absolute immunity, his *forum non conveniens* motion, and other jurisdictional grounds asserted for dismissal.[6] The order contained none of the findings and analysis required by the Ninth Circuit for ruling on *forum non conveniens* motions.[7] P. 2a, *infra*.

Petitioner filed a timely appeal under 28 U.S.C. § 1291. The Ninth Circuit, in an order signed by a "Conference Attorney," directed petitioner to show cause why the appeal should not be dismissed, stating that "Appellant's reliance on the collateral order doctrine is questionable." P. 5a, *infra*. The issue of appealability then was fully and extensively briefed by both parties.

In support of appealability under 28 U.S.C. § 1291 of the District Court's order denying his motion to dismiss for *forum non conveniens*, petitioner cited *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and argued that as a practical matter if an alien defendant's claim of *forum non conveniens* is not considered on appeal initially, then after final judgment the protection afforded by the doctrine is totally negated. He pointed out that the Fourth Circuit had so held, and that two of four judges of the District of Columbia Circuit who had discussed the point had agreed that an order denying a claim of *forum non conveniens* is immediately appealable under the collateral-order rule. *Hodson* v. *A. H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983); *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 461 U.S. 970 (1983)

[6] Petitioner had also moved to dismiss for lack of subject-matter jurisdiction, arguing that the civil RICO statute, 18 U.S.C. § 1964, on which respondent solely relied for federal jurisdiction, did not create jurisdiction of a suit between two aliens.

[7] See *Pereira* v. *Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *pet'n for cert. dismissed*, 106 S. Ct. 1253 (1986); p. 11, *infra*.

(Blackmun and Powell, JJ., noting dissent from denial of certiorari).

In support of appealability under 28 U.S.C. § 1291 of the denial of his claim of civil immunity, petitioner again cited *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, and in addition quoted this Court's holding in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), that

> "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525.

He also relied on other immunity cases that held appeals from rejection of immunity claims proper under 28 U.S.C. § 1291, including *Abney* v. *United States*, 431 U.S. 651 (1977), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). He also cited a long line of cases from several federal circuits upholding the civil immunity of extradited persons.

After the briefs had been submitted, the Ninth Circuit entered an order which read in its entirety:

> "This appeal is dismissed for lack of jurisdiction. *See Cohen v. Beneficial Industries* [sic] *Loan Corp.*, 337 U.S. 541 (1949); *Mitchell v. Forsyth*, 472 U.S. 511 (1985)." P. 1a, *infra*.

The two cases that the dismissal order cited had held the orders there in question appealable, and had in fact been relied upon by petitioner.

REASONS FOR GRANTING THE WRIT

Whether from haste, or from disagreement with rulings of this Court and courts of appeals for other circuits, the Ninth Circuit here has applied federal law in a way that alters accepted doctrine of appealability and denies substantial rights that would be unhesitatingly honored in federal courts elsewhere. The present ruling brings before

this Court on a very simple record two different conflicts in the circuits (one existing for the past four years, the other created by the present decision), as well as a plain failure to follow the law as declared by this Court. Each of these two distinct issues of appealability, even standing alone, merits grant of certiorari.

I. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER AN ORDER REJECTING A CLAIM OF *FORUM NON CONVENIENS* IS APPEALABLE UNDER 28 U.S.C. § 1291.

In the current state of the law, whether a defendant may appeal rejection of a *forum non conveniens* claim depends entirely upon which circuit he or she is in, or even which panel of circuit judges considers the appeal. The Fourth Circuit (Haynsworth, J., joined by Winter, C.J., and Chapman, J.) has held, exactly contrary to the Ninth Circuit here, that such orders are appealable under *Cohen* v. *Beneficial Industrial Loan Corp., supra. Hodson* v. *A. H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983). In the District of Columbia Circuit, four judges have expressed themselves on the point, and split 2-2.[8] *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.) (*en banc* review denied), *cert. denied*, 461 U.S. 970 (1983) (Blackmun and Powell, JJ., dissenting, Powell, J., with opinion).

At the time this Court denied certiorari to the District of Columbia Circuit in *Nalls* v. *Rolls-Royce Ltd., supra*, there was no split in the circuits. Even so, two Justices noted that they considered the issue appropriate for a grant of certiorari. Three months later, the *Hodson* case was decided by the Fourth Circuit, holding a denial of *forum non conveniens* appealable, and relying specifically

[8] Judges Wright and McGowan sitting as a panel of two without opinion dismissed the *forum non conveniens* appeal; Judges Wilkey and MacKinnon upon a suggestion for rehearing *en banc* filed an opinion in support of the opposite position; *en banc* review of the panel order was not granted.

on the opinion of the two D.C. Circuit judges in *Nalls* who had taken that position.

Since that time, the Sixth Circuit has held the opposite, explicitly pointing out the existence of the disagreement in the circuits. *Rosenstein* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352 (6th Cir. 1985). The Fifth Circuit last year went along with the Sixth Circuit view, while also commenting that "we recognize that strong countervailing arguments can be made," and citing the contrary holding of the Fourth Circuit in *Hodson* and the split views of the D.C. Circuit judges in *Nalls*. *Partrederiet Treasure Saga* v. *Joy Mfg. Co.*, 804 F.2d 308, 310 (5th Cir. 1986). The Second Circuit has recently reached the same conclusion, likewise noting the split in the circuits and acknowledging that the contrary "argument has some force." *Carlenstolpe* v. *Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987). The Fourth Circuit has continued to follow and apply its holding in *Hodson* and to hear appeals from orders denying *forum non conveniens* motions. *E.g.*, *Kontoulas* v. *A. H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).[9]

The reasons for appealability of *forum non conveniens* denials have been explained forcefully by the Circuit Judges who take that view. Judge Wilkey in the *Nalls* case, *supra*, joined by Judge MacKinnon, wrote:

> "*Forum non conveniens* motions thus present an issue collateral to the merits and important enough to warrant prompt review.
>
> ". . . The rights conferred by *forum non conveniens* law—the right not to be tried in an unrea-

[9] The Third Circuit has held that a refusal to dismiss for *forum non conveniens* is not appealable under 28 U.S.C. § 1291, but that a refusal to dismiss because of a forum-selection clause in a contract is. *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir.), *cert. denied sub nom. Coastal Steel Corp.* v. *Wheelabrator-Frye, Inc.*, 464 U.S. 938 (1983). The petition for certiorari in that case did not seek review of the *forum non conveniens* point.

> sonably inconvenient forum—will be effectively extinguished if review is postponed. . . . After the trial is concluded, all the expenses and burdens of trial in the inconvenient forum have already been incurred. To deny review until a final judgment is entered is to deny review altogether." 702 F.2d at 260.

Justice Powell, who with Justice Blackmun dissented from denial of certiorari in that case, wrote that he did so "for reasons similar to those stated by Judge Wilkey." *Rolls-Royce Ltd.* v. *Nalls*, 461 U.S. 970 (1983). The Fourth Circuit in *Hodson*, *supra*, relied on the same analysis.[10] Even the courts of appeals that have adopted the opposite conclusion have been at pains to note the seriousness of the question, and their respect for the reasoning that such orders are appealable. *Carlenstolpe* v. *Merck & Co.*, *supra*; *Partrederiet Treasure Saga* v. *Joy Mfg. Co.*, *supra*.

A case involving foreign parties—here both petitioner and respondent are aliens—particularly calls for prompt resolution of a substantial *forum non conveniens* claim. Recent years have seen more frequent efforts to use the courts of the United States, as after the Bhopal disaster, to hear lawsuits involving alien parties with witnesses far away. *Cf.*, *e.g.*, *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987) (affirming dismissal for *forum non conveniens*), *pet'ns for cert. pend-*

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[10] The Fourth Circuit also cited as comparable authority this Court's holding construing a similar statute in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), in which this Court held that

> "we believe that it serves the policy underlying the requirement of finality . . . to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U.S. at 558.

ing, Nos. 86-1719 and 86-1860. Here the issue is not merely that of choosing one United States court or another; rather, it is in which country one Belgian should sue another. Many of the events complained of occurred in Europe, most witnesses are there, and neither party has any permanent contact with the United States. Key European witnesses would not be amenable to service of process for trial. *Cf. Clement* v. *Pehar*, 575 F. Supp. 436 (N.D. Ga. 1983). The courts admittedly are open in their home city of Brussels, where both petitioner and respondent live and are well known; yet respondent declines to use them. The hardship, inefficiency, and waste of litigating here are clear. *Cf. Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).

Ironically, had the Court of Appeals here reviewed the District Court's order, instead of dismissing the appeal, reversal would have been virtually automatic, because the District Court here failed to make any of the very specific findings and analysis that the Ninth Circuit, like other courts of appeals, requires in rulings on *forum non conveniens* motions. See *Pereira* v. *Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *pet'n for cert. dismissed*, 106 S. Ct. 1253 (1986); *accord*, *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1166 n.32 (5th Cir. 1987) (*en banc*) ("If we are not supplied with either a written or oral explanation of the court's decision we will not be reluctant to vacate the lower court's judgment . . . ."); *C. A. La Seguridad* v. *Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983); *cf. Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257-60 (1981).

This Court has already warned of "the flow of litigation into the United States," that threatens to "further congest already crowded courts." *Piper Aircraft Co.* v. *Reyno*, *supra*, 454 U.S. at 252. With modern transportation and communications, ever more international transactions involving foreigners, and an attractive judicial system and potential civil damage awards in this

country, more instances of international *forum non conveniens* are likely to arise. It is intolerable that the law should remain conflicting in different circuits as to whether such motions if denied are appealable. It is a classic instance calling for this Court to settle the matter.

II. THE NINTH CIRCUIT'S HOLDING THAT A SUBSTANTIAL CLAIM OF ABSOLUTE IMMUNITY FROM CIVIL SUIT IS NOT APPEALABLE CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

A. The Ruling Fails To Follow *Mitchell* v. *Forsyth* and Other Decisions of This Court.

Another conflict exists. In *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), this Court held that

> "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525.

Mitchell itself involved a claim of only qualified immunity; yet this Court held the denial of the claim immediately appealable under 28 U.S.C. § 1291. *Accord, McDonald* v. *Smith*, 472 U.S. 479 (1985) (Petition clause). The present case is even stronger, for the immunity from suit asserted here is an absolute one, as it was in *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy), *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech and Debate Clause), *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (official immunity), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (same).[11] In each of those cases, appeal of the denial of immunity was held to lie under § 1291.

Denial of a claim of absolute immunity from suit is appealable under § 1291 because such a denial meets the three criteria of the doctrine of *Cohen* v. *Beneficial Indus-*

[11] *Nixon* and *Harlow* were cases where, as here, the dismissal by the court of appeals had been without opinion.

trial Loan Corp., supra, as amplified by this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). Those criteria, as stated in the latter case, 437 U.S. at 468, are:

(1) "The order must conclusively determine the disputed question . . . ." The District Court's order here unambiguously rejected the claim of immunity.

(2) The order must "resolve an important issue completely separate from the merits of the action." That also was the case here; the immunity from civil suit of a person whose presence in the United States was obtained by extradition is determinative of whether petitioner could be required to defend the case at all, and the answer has nothing to do with the merits of the suit itself.

> "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law . . . ." *Mitchell* v. *Forsyth*, 472 U.S. at 528.

Moreover, the claim of civil immunity following extradition is a substantial one, the validity of which up to now has been honored by the courts without question. See pp. 15-16, *infra*.

(3) Finally, the resolution of the issue must be "effectively unreviewable on appeal from a final judgment." That is the case when immunity is denied, because the right asserted is "its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, *supra*, 472 U.S. at 525. It is lost if the case must be defended.

By ignoring what this Court unequivocally held about absolute immunity in *Abney*, *Mitchell*, *Harlow*, *Helstoski*, and *Nixon*, the Court of Appeals here issued a decision that unquestionably contradicts the law declared by this Court.

B. The Ruling Also Is in Conflict With Decisions of the Third, Seventh, and Eleventh Circuits.

The decision is in conflict also with recent holdings in other circuits that apply the *Cohen-Mitchell* doctrine to allow immediate appeal when similar immunities are asserted. Thus, for example, in *Segni* v. *Commercial Office*, 816 F.2d 344 (7th Cir. 1987), the Seventh Circuit earlier this year held appealable a foreign defendant's claim of immunity from suit based on the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601, *et seq.* The Eleventh Circuit held the same thing last year with respect to a claim of immunity from suit under the antitrust laws. *Commuter Transp. Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986). And the Third Circuit has held that even a forum-selection clause in a contract suffices to create an immunity whose denial is appealable under *Cohen*. *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195 (3d Cir.), *cert. denied sub nom. Coastal Steel Corp.* v. *Wheelabrator-Frye, Inc.*, 464 U.S. 938 (1983). Certainly the claim of immunity in the present case is no less compelling and clear than the claims of immunity allowed review in those other circuits.

C. The Claim of Absolute Immunity Is Substantial.

A prerequisite to collateral review under the *Cohen-Mitchell* doctrine is that the assertion of imunity have a substantial basis in law. Here petitioner's claim unquestionably did; in fact, all the law was on petitioner's side. Until now, there has never been a case as far as we can determine, and certainly no reported case, that failed to recognize an extradited person's immunity from civil suit. To the extent that its holding implicitly fails to acknowledge that clear immunity, the Ninth Circuit put itself in conflict with square holdings of the Second, Fifth and Sixth Circuits, and with many holdings in the district and state courts and even of this Court as well.

1. An Unbroken Line of Decisions Holds Extradited Persons Immune from Civil Suit.

Heretofore there was never been any doubt that when, as here, an extradition treaty is used to bring a person to the United States for criminal proceedings, the extradited person while subject to those proceedings cannot be subjected to civil suits here. In *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934), the Second Circuit recognized the rule that "a prisoner may not be subject to arrest on civil process after extradition from a foreign country . . . ." It cited with approval *In re Baruch*, 41 Fed. 472, 474 (C.C.S.D.N.Y. 1890), which held the rule to be that "his enforced presence under a federal law for treaty purposes, and for this special purpose only, is a presence which no other persons have a right to take advantage of," and

> "that the proceeding under the treaty is for a limited and defined purpose only, and that the exercise of jurisdiction over the prisoner for any other purpose than that mentioned in the treaty, until he has an opportunity to return, is a fraud upon the rights of the party extradited, and bad faith to the country which permitted the extradition." *Id.* at 473.

Likewise, the Fifth Circuit in rejecting such a civil claim held: "certainly a court should not allow itself to be made the instrument of perverting the process of extradition to serve the purposes of a private litigant who was instrumental in having that process resorted to . . . ." *Smith* v. *Government of the Canal Zone*, 249 Fed. 273, 279 (5th Cir. 1918); see also, *e.g.*, *Blumen* v. *Haff*, 78 F.2d 833, 835 (9th Cir.), *cert. denied*, 296 U.S. 644 (1935); *In re Reinitz*, 39 Fed. 204 (C.C.S.D.N.Y. 1889).

At root, the doctrine rests on this Court's much-cited holding in *United States* v. *Rauscher*, 119 U.S. 407

(1886), that an extradited person may not be held to answer for other legal proceedings than the criminal trial of the offense for which he was extradited. It has always been recognized that extradition exists to serve public prosecutorial interests, and that after extradition it is "the prosecutorial authorities and courts of the demanding State, whose duty it is to justly enforce the demanding State's *criminal* law." *California* v. *Superior Court*, 107 S. Ct. 2433, 2438 (1987) (interstate extradition) (emphasis supplied). "The fugitive having been delivered up for the sole purpose of being tried for the offence with which he was charged, and the disability of the courts being jurisdictional, it follows that the prisoner is not liable to their process for civil any more than for general criminal purposes. The fugitive is not delivered up with a view to answer in civil suits in any respect." 1 J. MOORE, EXTRADITION 272 (1891); *accord*, 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 239 (1942). Until now, those longstanding authorities have always been followed, without any reported exception.

2. *Civil Immunity Even for Persons Not Extradited Is Recognized When They Are Brought into a Jurisdiction Solely for Criminal Proceedings.*

The civil immunity of persons entering a jurisdiction for a criminal trial is in fact so broad that many cases do not limit it to persons brought in by international extradition treaties. It is applied as well to defendants extradited from one state to another. See, *e.g.*, *Adamy* v. *Parkhurst*, 61 F.2d 517 (6th Cir. 1932); *State ex rel. Stipec* v. *Owen*, 271 S.W.2d 864 (Mo. App. 1954); *Bramwell* v. *Owen*, 276 Fed. 36 (D. Ore. 1921). Indeed, even respondent in the present case acknowledged this. A declaration of respondent's counsel stated that he had hesitated to try to serve petitioner with process because of "case authority questioning the validity of serving a

defendant during a compelled appearance in a judicial proceeding." R. 141-42.[12]

Many federal courts have gone still further. They have more broadly held that even in the absence of any extradition, when a person is in a jurisdiction for purposes of a criminal trial, he or she is immune from civil process during the period related to that attendance. As this Court summarized in the leading case of *Stewart* v. *Ramsay*, 242 U.S. 128 (1916),

> "The true rule, well founded in reason and sustained by the greater weight of authority, is, that suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going." 242 U.S. at 129.[13]

The number of persons sought by this country through extradition is increasing every year. See Hearings on H.R. 2643 Before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives 34 (1983). Not to recognize the long-established civil immunity that is part and parcel of extradition would not only be a break from precedent, but in the long run could be self-defeating. The willingness of other countries to comply with U.S. extradition requests designed to enforce crim-

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[12] The immunity of course extends to a period of sentence after trial, including, as here, a sentence of probation. *E.g.*, *Adamy* v. *Parkhurst*, 61 F.2d 517 (6th Cir. 1932).

[13] See also, *e.g.*, *Alla* v. *Kornfeld*, 84 F. Supp. 823 (N.D. Ill. 1949); *Feister* v. *Hulick*, 228 Fed. 821 (E.D.Pa. 1916); *Kaufman* v. *Garner*, 173 Fed. 550 (C.C.W.D. Ky. 1909); *Shapiro & Son Curtain Corp. v. Glass*, 348 F.2d 460 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965) (deposition witness); *Sherwin-Williams Co. v. American Chemical Paint Co.*, 67 F. Supp. 685 (D. Del. 1946) (deposition witness); *Youpe* v. *Strasser*, 113 F. Supp. 289 (D.D.C. 1953) (witness before congressional committee); *Sullivan* v. *Kilgore Mfg. Co.*, 100 F. Supp. 983 (E.D.N.Y. 1951) (hearing witness).

inal law is likely to diminish if this country appears to be allowing its extradition treaties be taken advantage of to serve the private interests of foreign civil litigants. *Cf. Smith* v. *Government of the Canal Zone, supra*; *In re Baruch, supra.*

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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August 27, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6735

DC# CV-85-7378-JSL
Central California

ROGER BIARD,
Plaintiff,

vs.

ALAN H. BLAIR, *et al.*,
Defendants,

and

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed July 7, 1987]

ORDER

Before: BROWNING, ALARCON and THOMPSON, Circuit Judges

This appeal is dismissed for lack of jurisdiction. *See Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

MoCal 6/26/87

APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-7378 JSL (JRx)

ROGER BIARD,
Plaintiff,

vs.

ALAN H. BLAIR, MONIQUE MAT, GERALD L. BILTON,
WILFRIED VAN CAUWENBERGHE, and
THREE B INVESTMENT ASSOCIATES,
Defendants.

[Filed Nov. 17, 1986]

[PROPOSED] ORDER DENYING DEFENDANT WILFRIED VAN CAUWENBERGHE'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND GRANTING DEFENDANT WILFRIED VAN CAUWENBERGHE'S MOTION TO SET ASIDE DEFAULT

Defendant Wilfried Van Cauwenberghe's Motion to Dismiss plaintiff Roger Biard's First Amended Complaint, to Strike Request to Enter Default and to Set Aside Default came on for a determination before the Honorable J. Spencer Letts, United States District Judge, in the United States Courthouse, 312 North Spring Street, Los Angeles, California. Plaintiff Roger Biard appeared and was represented by Bryan, Cave, McPheeters and McRoberts, by Percy Anderson and Albert S. Golbert. Defendant Wilfried Van Cauwenberghe specially appeared and was represented by Williams & Connolly, by John G. Kester.

The Court having read and considered the pleadings, declarations, exhibits, documents on file, admissions of counsel, the memoranda of points and authorities submitted by the parties in support of and in opposition to defendant's motion to dismiss, to strike the request to enter default, and to set aside default, the argument of counsel [*sic*], and the Court having found that justice requires that further proceedings in this case be subject to this order,

IT IS HEREBY ORDERED:

That the motion of defendant Wilfried Van Cauwenberghe to set aside default be and it is hereby granted; and

That the motion of defendant Wilfried Van Cauwenberghe to dismiss the plaintiff's First Amended Complaint be and it is hereby denied.

Counsel for plaintiff is directed to serve a copy of this order to the parties appearing herein by United States mail.

DATED: November 17, 1986

/s/ J. Spencer Letts
J. SPENCER LETTS
United States District Judge

Presented By:

BRYAN, CAVE, MCPHEETERS & MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

/s/ Percy Anderson
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Attorneys for Plaintiff
Roger Biard

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6735

DC# CV-85-7378-JSL
Central California

ROGER BIARD,
Plaintiff,
vs.

ALAN H. BLAIR, *et al.*,
Defendants,
and

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Jan. 23, 1987]

ORDER

Appellant seeks to appeal the district court's refusal to dismiss the complaint. Appellant's reliance on the collateral order doctrine is questionable.

Within 14 days of the entry of this order, appellant shall withdraw this appeal or show cause why it should not be dismissed for lack of jurisdiction. Plaintiff may have 10 days to reply to appellant's response.

If appellant does not comply with this order, the appeal will be dismissed by the Clerk under Ninth Circuit Rule 19(b).

FOR THE COURT:

/s/ Norman P. Vance
NORMAN P. VANCE
Conference Attorney

1.16/7

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-336

In The
Supreme Court of the United States
October Term, 1987

WILFRIED VAN CAUWENBERGHE,

Petitioner,

v.

ROGER BIARD,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a district court's order denying a motion to dismiss on grounds of forum non conveniens appealable to the court of appeals under 28 U.S.C. § 1291 and the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

2. Is a district court's order denying an extradited person's claim of absolute immunity from civil process appealable to the court of appeals under 28 U.S.C. § 1291, *Cohen*, and *Mitchell v. Forsyth*, 472 U.S. 511 (1985)?

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No. 87-336

In The
Supreme Court of the United States
October Term, 1987

WILFRIED VAN CAUWENBERGHE,

Petitioner,

v.

ROGER BIARD,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent prays that the writ of certiorari sought by Petitioner to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 7, 1987, be denied.

JURISDICTION

Consideration of Petitioner's writ of certiorari is governed by Rule 17 of the Supreme Court Rules, which provide that a review "will be granted only when there are special and important reasons therefor." U.S. Sup. Ct. Rule 17, 28 U.S.C.A. As will be developed below, the questions for review presented by Petitioner do not in any way satisfy this requirement. With the exception of the Fourth Circuit, each circuit that has addressed the issue has ruled that an order denying a motion for forum non conveniens is not an appealable collateral order contemplated by the ruling announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Thus, the "conflict" among the circuits upon which Petitioner bases this writ simply does not exist.

The second question likewise is an issue that petitioner has fabricated out of a settled question of law. Notwithstanding Petitioner's misrepresentation to the contrary, the Ninth Circuit in denying Petitioner's appeal did not hold "that a substantial claim of absolute immunity from civil suit is not appealable" contradicting thereby the Supreme Court's ruling in *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Rather, the Court merely refused to overturn the district court's decision without opinion and without reference to the appealability of the issue of absolute immunity. The Ninth Circuit most likely recognized that Petitioner does not have even a colorable claim to absolute immunity, and therefore saw no reason to reach that issue. Petitioner has not, and cannot, cite any authority in support of his claim to absolute immunity from civil suit solely

on the basis of his extradition to the United States to face criminal charges.

Petitioner's attempt to contort the parameters of Rule 17 to include settled questions of law is of questionable propriety. The questions presented affect no interest other than those of Petitioner in escaping civil liability for the conduct—much of which took place in Los Angeles, California—leading to his criminal conviction. Because these questions are not properly within the scope of review contemplated by Rule 17, certiorari should be denied.

—o—

STATEMENT

On November 12, 1985, Respondent Biard instituted the underlying claim based upon RICO in the district court for damages, breach of contract, fraud, unjust enrichment, breach of the covenant of good faith and fair dealing and wrongful denial of the existence of a contract. The filing of the action followed the return of an Indictment by a Federal Grand Jury in the Central District of California charging Petitioner and others with conspiracy, wire fraud, and interstate transportation of a victim of a fraud in violation of Title 18, United States Code, Sections 371, 1343, and 2314. *See United States v. Van Cauwenberghe, et al.,* CR 84-963 (C.D. Cal. January 22, 1986) (Hauk, J.).

On February 27, 1986, Petitioner filed a motion to dismiss the first amended complaint on the following grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction (because he had been extradited

to the United States); (3) forum non conveniens; (4) insufficient process; and (5) inadequate service of process.

On April 25, 1986, the district court notified the parties that Petitioner's motion to dismiss was taken under submission. On June 13, 1986, the parties appeared before the Honorable J. Spencer Letts, who denied Petitioner's motion to dismiss the first amended complaint. The district court specifically rejected Petitioner's contention that he was immune from civil process because he had been extradited to the United States.

On November 17, 1986, the district court entered a written order denying Petitioner's motion to dismiss. The district court's order was not a final disposition as to all claims by all parties. Thereafter, and without a request that the district court direct the entry of a judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, Petitioner appealed to the Ninth Circuit Court of Appeals.

On July 7, 1987, the Ninth Circuit dismissed the appeal based upon lack of jurisdiction, citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

During the pendency of this appeal, the district court granted a motion for summary judgment against Petitioner.

———o———

REASONS FOR DENYING THE WRIT

I. PETITIONER'S RELIANCE ON THE COLLATÆRAL ORDER DOCTRINE IS MISPLACED.

This writ rests entirely on Petitioner's misapplication of the "collateral order doctrine" announced in *Cohen* to justify Supreme Court review of two well-settled issues of law. Before reaching these issues, a brief overview of the law of collateral appeal and the supporting policy rationale is appropriate.

Unless an order in a multiple party or multiple claim action is accompanied by an express determination and direction by the trial court as required by Rule 54(b), it is neither final nor appealable as a final judgment. Fed. Rules Civ.Proc. Rule 54(b), 28 U.S.C.A. As stated by the Court in *Aleut Tribe v. United States*, 702 F.2d 1015, 1020 (Fed. Cir. 1983): "[a]n appeal from the order that disposes of only some claims of an action may not be made without waiting for a decision on the remainder of the case, unless the requirements of Rule 54(b) of the Federal Rules of Civil Procedure are met." Thus:

> Rule 54(b) requires two steps before an appeal can be perfected. The trial judge must make (1) 'an express determination that there is no just reason for delay,' and (2) an 'express direction for the entry of judgment.' The 'combination of the direction and determination can be referred to as a "certification" that a particular judgment is ripe for review.' 10 C. Wright & A. Miller, Federal Practice and Procedure § 2660, at 82 (1973).

The primary purpose of Rule 54(b) is to determine finality for purposes of appeal. *See* 6 Moore's Federal Practice, ¶54.42 (1987). Rule 54(b) gives the district court

discretion to certify that its decision on one or more (but not all) of the claims is ready for appeal. *See Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). As a result, the district may designate, if it finds it appropriate to do so, those issues ripe for appellate review that will not disturb the district court's resolution of the remainder of the case. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). The requirements of "an express determination that there is not just reason for delay" and "an express direction for the entry of judgment" were added to the Rule in 1948 to "provide an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). As stated in *Samuel v. University of Pittsburgh*, 506 F.2d 355, 361 (3rd Cir. 1974), "the knowledge bred of the district court's proximity to the case can be brought to bear on the question of the propriety of immediate review."

Petitioner has ignored Rule 54(b) (thereby subverting the policy rationale supporting it) and has chosen the Supreme Court instead as the forum to oppose this interlocutory order. Petitioner is extending the collateral order doctrine to include well-settled issues of law to justify his summary disregard of the conventional channels of review provided to him by Rule 54(b).

A significant aspect of the *Cohen* rule—and one that prevents its application to the questions presented in this petition—is that the case involved substantial questions of

due process and equal protection. *See Donlon Industries, Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968) (*Cohen* requires the presence of a question of general importance beyond the immediate concern of the particular litigants). Courts generally have shown a growing resistance to any extension of the *Cohen* rule. *Borden Co. v. Sylk*, 410 F.2d 843 (3rd Cir. 1969). As Professor Moore explains, this resistance is justified:

> The rule emerged at a time when the final judgment rule was inflexible. Much has happened since. The Interlocutory Appeals Act of 1958 made potentially appealable very near all orders that present serious, undecided questions. The 1963 amendment of Rule 54(b) made potentially appealable a host of other orders.

9 Moore's Federal Practice ¶110.10, pp. 135-136 (1987).

Important policy considerations compel a restrained reading of the *Cohen* rule. The "final order" rule reflects a "strong congressional policy against piecemeal reviews and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *Heat & Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017, 1020 (Fed. Cir. 1986) (quoting *United States v. Nixon*, 418 U.S. 683 (1974)); *Chaparral Communications, Inc. v. Boman Industries, Inc.*, 798 F.2d 456, 459 (Fed. Cir. 1986) (the need for an immediate appeal was clearly outweighed by the policy against piecemeal adjudication). In recent decisions, the Supreme Court has indicated that departure from the rule will be allowed only for the limited category of cases falling within the "collateral order" exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). That exception is a "narrow" one

whose reach is limited to trial court orders affecting rights that will be "irretrievably lost" in the absence of an immediate appeal. *See Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 105 S.Ct. 2757, 2761 (1985); *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8 (1980) (the Supreme Court noted that the courts must take into account "judicial administrative interests as well as the equities involved.").

The case law narrowly defines the scope of appealable issues carved out by *Cohen.* Petitioner's instant attempt would eviscerate years of well-reasoned precedent and careful judicial policy for the self-serving expediency afforded by Supreme Court review of his case. This is hardly a proper basis for a writ of certiorari.

II. WITH THE SINGLE EXCEPTION OF THE FOURTH CIRCUIT, THOSE CIRCUITS THAT HAVE RULED ON THE ISSUE HOLD THAT AN ORDER REJECTING A CLAIM OF FORUM NON CONVENIENS IS NOT APPEALABLE UNDER COHEN.

As defined by *Cohen,* the collateral order doctrine permits immediate appeals from a small class of interlocutory orders that (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) [are] effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978); *United States v. Ohnick,* 803 F.2d 1485 (9th Cir. 1986); *Cabot Corp. v. United States,* 788 F.2d 1539, 1543 (Fed. Cir. 1986).

Of the six Circuits that have addressed the issue, five have ruled that an order rejecting a motion to dismiss

based on forum non conveniens is not an appealable interlocutory order. *See Partrederiei Treasure Saga v. Joy Mfg. Co.,* 804 F.2d 308 (5th Cir. 1986); *Rosenstein v. Merrell Dow Pharmaceuticals, Inc.,* 769 F.2d 352 (6th Cir. 1985); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190 (3rd Cir.), *cert. denied,* 464 U.S. 938, 104 S.Ct. 349 (1983); *Nalls v. Rolls-Royce Ltd.,* Nos. 82-1975, -1976, -2033, *reh'g denied,* 702 F.2d 255 (D.C. Cir.), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444 (1983). Only the Fourth Circuit has permitted an interlocutory appeal from the denial of forum non conveniens motion. *Carlenstolpe v. Merck & Co., Inc.,* 819 F.2d 33 (2d Cir. 1987).

The well-reasoned view of the Second Circuit on this issue was espoused in *Carlenstolpe.* The Court ruled that the denial of a forum non conveniens motion failed to meet the requirements set forth in *Cohen*:

> A forum non conveniens determination cannot be considered 'completely separate' from the merits of the action because such a determination requires an examination of the alleged culpable conduct to assess where the conduct took place and the relation of the conduct to the plaintiff's chosen forum. Indeed, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947), mandates that a forum non conveniens motion be decided by looking into access to sources of proof; availability of compulsory process for attendance of unwilling . . . witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. As such, the determining factors in a forum non conveniens motion are 'enmeshed' in the underlying cause of action, see *Rosenstein,* 769 F.2d at 354, and necessarily involve an inquiry into the merits of the action, see *Partrederiet,* 804 F.2d at 310; *Coastal Steel,* 709 F.2d at 195.

819 F.2d at 36.

Petitioner relies heavily on Judge Wilkey's dissent in *Nalls v. Rolls-Royce, Ltd., supra,* to lend credence to his untenable position. This dubious "precedent" pales in comparison to the nearly unanimous and contrary law that the Circuits have developed. Moreover, the logical underpinnings of Judge Wilkey's dissent have been addressed in subsequent decisions. The Court responded directly to Judge Wilkey's dissent argument in *Nalls* that a motion on the grounds of forum non conveniens is comparable to a motion to dismiss an indictment on the grounds of double jeopardy, by stating that the interests served are "not of the same constitutional magnitude; a 'liberty interest' is not at stake." *Carlenstolpe,* 819 F.2d at 36. While a forum non conveniens dismissal saves the defendant the inconvenience and expense of litigating in a location removed from the primary locus of the challenged conduct, "[i]t does not save him from trial altogether, as application of the double jeopardy clause would do." *Id.* The Court also observed that allowing interlocutory appeal of denied forum non conveniens motions "would, in general, prolong litigation and increase litigation expenses. The availability of a time-consuming interlocutory appeal from every denied motion will undercut the primary purpose of the forum non conveniens determination: ensuring prompt and inexpensive trial proceedings." *Id.* at 37.

The Third Circuit agrees and has held that a forum non conveniens contention does not fit comfortably within the three-part formulation applied to *Cohen* by the Supreme Court in *Coopers & Lybrand v. Livesay, supra,* 437 U.S. 463. *Coastal Steel v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 195 (3rd Cir. 1983) (a forum non conveniens

determination cannot easily be made without reference to the merits of the case).

The Sixth Circuit also has held forum non conveniens motions not appealable under *Cohen.* "The *Cohen* principle is not available to confer immediate reviewability on orders which involve considerations that are 'enmeshed' in the factual and legal issues of the cause of action." *Rosenstein v. Merrell Dow Pharmaceuticals, Inc.,* 769 F.2d 352, 354 (6th Cir. 1985). The Court went on to state:

> In the instant case, resolution of the forum non conveniens issue would require the court to 'enmesh' itself deeply with the innumerable factual and legal disputes presented by this controversy. . . . Hence, the instant appeal does not meet the second element of the *Cohen* analysis. In addition, the decision is effectively reviewable on appeal subsequent to the trial on the merits, and therefore fails under the third category of the *Cohen* appealability doctrine.

Id.

The Fourth Circuit stands alone in its view that the denial of a motion to dismiss based on forum non conveniens is appealable under *Cohen.* The remaining Circuits that have addressed the issue unanimously agree that this is not the proper basis for an appeal under the collateral order doctrine, and have supported their position with ample authority and sound policy. Petitioner's representation that the Circuits are "split" on this issue is unfounded. There remains no compelling issue of law to be decided.

III. THE NINTH CIRCUIT HAS NEVER HELD THAT THE DENIAL OF A SUBSTANTIAL CLAIM OF ABSOLUTE IMMUNITY IS NOT APPEALABLE UNDER COHEN.

In *Mitchell v. Forsyth,* 472 U.S. 511 (1985), the Supreme Court held that the dismissal of a claim of absolute or qualified immunity for a government official is appealable under *Cohen.* Petitioner disingenuously portrays the Ninth Circuit's denial of his appeal as somehow conflicting with this holding. The appellate decision did not discuss the rule of law announced in *Mitchell,* and cannot be construed beyond its limited refusal to recognize the validity of Petitioner's claims and reverse the district court. However, before discussing the scope of the *Mitchell* holding there exists the preliminary issue of whether Petitioner is entitled to immunity from civil suit.

A. The Rule of Speciality Does Not Protect an Extradited Person from Civil Process

Petitioner's claim of absolute immunity rests on his yet unrecognized view that an extradited person is immune from civil liability while present in the extraditing country to face criminal charges. This notion is an unwarranted extension of the "rule of speciality," wherein an extradited person is immune from *prosecution* for any crime other than those for which he was extradited. *See* Article IX of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. This doctrine has long been recognized in the United States. *Shapiro v. Ferrandina,* 478 F.2d 894, 905 (2d Cir.), *cert. dismissed,* 414 U.S. 884 (1973). *See also, United States v. Rauscher,* 119 U.S. 407, 415-430 (1886) (analyzing cases

and writings on treaties and the rule of speciality); *Naprstek v. Norwich,* 545 F.2d 815 (2nd Cir. 1976); *Quinn v. Robinson,* 783 F.2d 776, 783 (9th Cir. 1986).

The "rule of speciality," like most customary rules of International Law, is intended to bind only nation states that recognize it. This self-imposed restraint has no application to private citizens seeking to vindicate claims in the civil courts. As such, the rule of speciality has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused. *Shapiro v. Ferrandina, supra,* 478 F.2d at 906; *see United States ex rel. Donnelly v. Mulligan,* 74 F.2d 220, 223 (2d Cir. 1934) (extradition treaties are for the benefit of the contracting nations, rights of asylum and immunity thus belong to the country and not to the criminal). This doctrine has never been held to deny *civil* jurisdiction over a party.

The cases which Petitioner cites do not support his application of the doctrine of specialty to prevent redress of civil claims by private citizens; they discuss immunity from government arrest afforded by that doctrine.[1] The holding in *Blumen v. Haff,* 78 F.2d 833 (9th Cir. 1935), was based on the government's arrest of the extradited person and the subsequent efforts to deport him. Likewise, the Court in *United States ex rel. Donnelly v. Mulli-*

---

[1] Petitioner's interpretation of the doctrine of specialty to provide absolute immunity from civil suits would provide a windfall for criminals by forever absolving them from civil liability for their wrongs. For example, a United States citizen extradited to this country to face criminal charges could avoid civil liability for his conduct by remaining in the United States after trial and forever after asserting the doctrine of speciality to deny his victims' civil redress.

gan, 74 F.2d 220, 223 (2d Cir. 1934), ruled that a ". . . prisoner may not be subject to *arrest* on civil process after extradition from a foreign country. . . ." (emphasis supplied). In *Mulligan,* the appellant was extradited from France to the United States to stand trial, and subsequently was arrested by U.S. officials and sent to Canada to stand trial without France's permission. The case of *Stewart v. Ramsay,* 242 U.S. 128 (1916), has nothing to do with the rule of specialty or foreign extradition; it involved the validity of service of process on a Colorado resident voluntarily appearing at a trial in Illinois. Defendant's reliance on *In re Baruch,* 41 F. 472, 474 (C.C.S.D.N.Y. 1890) for the proposition that he is immune from civil process is also misplaced. In *Baruch,* the court held that the defendant was immune not from the jurisdiction of the civil courts, but from government arrest pending a final judgment.

Petitioner has cited no authority to support his contention that the rule of speciality confers absolute immunity from civil liability upon an extradited person. Indeed, there is none. The cases Petitioner cites involve arrest or deportation by the government. The rule of specialty simply does not confer immunity against civil process. Moreover, Petitioner was extradited pursuant to an "Extradition Treaty" which would supercede, in any case, customary international law as between its High Contracting Parties, Switzerland and the United States. Were immunity from civil process intended by the Parties to be extended to persons extradited thereunder, it would have so provided. It did not. The Treaty is silent as to civil actions, prohibiting only ". . . Prosecut(ion) or punish(ment) for any offense committed before the demand for

extradition, other than that for which extradition is granted . . ." Art. IX, 31 Stat. 1928; Treaty Series 354.

B. The Mitchell Holding Applies Only To Immunity That Is Potentially Dispositive Of The Underlying Claim

Even were the Court to accept Petitioner's proposition that the doctrine of speciality should be extended to include immunity from civil suit incident to Petitioner's extradition, such immunity would not be sufficiently pervasive to satisfy the requirements of the collateral order doctrine espoused in *Cohen.*

It is clear that an order denying an individual absolute immunity is properly appealable under *Cohen* because the ultimate resolution of this issue may save the appellant from ever having to defend his conduct in a civil action. This satisfies the requirement that "[b]efore the *Cohen* test will apply, the appellant must show that the District Court's erroneous decision will deprive him of some protected interest." *Mayacamas v. Gulfstream Aerospace Corp.,* 806 F.2d 928, 930 (9th Cir. 1986). *See Helstoski v. Meanor,* 442 U.S. 500 (1979) (absolute immunity under the Speech and Debate Clause); *Abney v. U.S.,* 431 U.S. 651 (1977) (absolute immunity under the Double Jeopardy Clause); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982) (absolute immunity for president from liability predicated on his official acts); *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (qualified immunity for government officials acting within the scope of their official duties). In *Mitchell,* the Court reviewed the dismissal of a claim of absolute or qualified immunity from civil liability by the Attorney General of the United States. This question

truly was "too important to be denied review," *Cohen v. Beneficial Loan Corp., supra,* 337 U.S. 541, 69 S.Ct. 1221, 1226, as it affected the rights and obligations of other public officials as well as Mitchell. Under these immunities it is wholly proper that an interlocutory order deciding the applicability of the immunity be appealable, for a judicial resolution favorable to the appellant is determinative of the underlying civil suit.

By contrast, Petitioner's motion to dismiss raises no such substantial questions of law; it is merely an effort to delay and ultimately prevent a fraud victim from seeking civil redress against the convicted perpetrator of the fraud.

Petitioner's construction of the rule of speciality would provide neither absolute nor qualified immunity; rather, it would be narrowly restricted to deny civil jurisdiction gained solely from the presence of an extradited person in the forum country. Thus, while the issue of *absolute* immunity justifies an exception under *Cohen* because it addresses the defendant's *ultimate* liability for his actions, the restricted immunity claimed by Petitioner would protect him only briefly—the period incident to his extradition to this country. Respondents are free to sue Petitioner in Belgium, or obtain jurisdiction over him in this country once the protection afforded by the rule of specialty expires. Because Petitioner remains liable for his conduct, the holding in *Mitchell* is inapposite.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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October 15, 1987

REPLY

BRIEF

Supreme Court, U.S.
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No. 87-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. Respondent concedes that there is a square conflict with the Fourth Circuit's holdings that denials of motions to dismiss for *forum non conveniens* are appealable under 28 U.S.C. § 1291. Respondent asks that certiorari be denied because other circuits are also in conflict with the Fourth Circuit's view.

The existence of an acknowledged conflict in the courts of appeals on this major and frequently arising question of federal appellate jurisdiction makes certiorari clearly appropriate. Indeed, the issue is of sufficient importance that two Justices of this Court took the unusual step of noting their view that certiorari should be granted to settle the issue when it first arose four years ago, even before any conflict in the circuits had developed. *Rolls-Royce Ltd.* v. *Nalls*, 461 U.S. 970 (1983) (Blackmun and Powell, JJ., dissenting).

Moreover, the Fourth Circuit's holding is specifically based upon the much-cited opinion of two circuit judges from the D.C. Circuit who emphatically urged that such orders are appealable, and with whom Justice Powell stated he also agreed. *Nalls* v. *Rolls-Royce, Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 461 U.S. 970 (1983). Even the courts of appeals that have, like the Ninth Circuit here, rejected the Fourth Circuit's holding, have gone out of their way to acknowledge that there are strong arguments supporting the view of the Fourth Circuit and the two D.C. Circuit judges. See *Carlenstolpe* v. *Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987) (position adopted "[d]espite the reasoning in this opinion" of Judge Wilkey in the D.C. Circuit, and even though "this argument has some force"); *Partrederiet Treasure Saga* v. *Joy Mfg. Co.*, 804 F.2d 308, 310 (5th Cir. 1986) ("we recognize that strong countervailing arguments can be made"). The issue is obviously a live, important and troubling one. Having different rules in different federal circuits on so basic a question as appealability is too fundamental an issue not to resolve.

2. Respondent's discussion of the second issue—appealability of rejection of an extradited person's claim of civil immunity—is difficult to follow. The brief in opposition seems to be saying that such a claim of immunity is not substantial enough to call the doctrine of *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), into play. To get to that conclusion, respondent is led to assert that "Petitioner has cited no authority to support his contention that the rule of speciality confers absolute immunity from civil immunity upon an extradited person." Br. Opp. at 14. He also says that "This doctrine has never been held to deny *civil* jurisdiction over a party." *Id.* at 13 (emphasis in original).

The trouble with those assertions is that they are simply not true. They are all the more puzzling because the petition for certiorari cites both cases and respected treatises that recognize the civil immunity of extradited

persons. *E.g.*, *Smith* v. *Government of the Canal Zone*, 249 Fed. 273, 278 (5th Cir. 1918) ("The only service upon him . . . . was not permissible because of the court's lack of jurisdiction of the appellant for any purpose other than the one for which he was delivered by the Panama authorities . . . ."); 1 J. MOORE, EXTRADITION 272 (1891) ("The fugitive is not delivered up with a view to answer in civil suits in any respect"); 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 239 (1942). All these respondent ignores. Other immunity cases that respondent describes as instances of "government arrest," Br. Opp. at 13, in fact were ordinary civil cases; the "government arrest" to which they referred was simply by the sheriff or marshal who served process. *E.g.*, *In re Baruch*, 41 Fed. 472 (C.C.S.D.N.Y. 1890). Many other cases cited in the petition but ignored by respondent clearly involved only a civil summons. *E.g.*, *Adamy* v. *Parkhurst*, 61 F.2d 517 (6th Cir. 1932) ("the validity of this service presents the only question raised by the present appeal"); *Bramwell* v. *Owen*, 276 Fed. 36, 39 (D. Ore. 1921) ("the one question for decision . . . is, whether there was a valid service of the summons") (interstate extradition).[1] Respondent also chooses not to acknowledge the many cases, cited in the petition at 16-17, that recognize civil immunity even for non-extradited defendants.[2]

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[1] Respondent's discussion, Br. Opp. at 5-8, of Rule 54(b) of the Federal Rules of Civil Procedure has nothing to do with this case, which is about appealability of collateral orders under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and 28 U.S.C. § 1291. Respondent's suggestion, *id.* at 15, that *Cohen* should be restricted to apply only to "pervasive" immunities has no support in the reasoning of that case or of *Mitchell* v. *Forsyth*. It also ignores that instances of extradition are surely no less frequent than those of double jeopardy, see *Abney* v. *United States*, 431 U.S. 651 (1977); and that the immunity of a President of the United States could hardly be called "pervasive," see *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

[2] Respondent's suggestion, Br. Opp. at 14, that the civil immunity depends on treaty provisions, misunderstands the cases; they rest

Moreover, for appealability under *Mitchell* v. *Forsyth*, the test is not whether this claim of civil immunity was correct (plain and settled as that is), but only whether it was substantial. In light of all the authorities confirming such immunity, and respondent's notable failure to find a single case to the contrary, it is difficult to see how the immunity claim here could be called anything less than substantial.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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October 20, 1987

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on the *Rauscher* rule that extradition is for purposes of criminal trial only. *See, e.g., In re Baruch, supra.* Respondent's suggestion, *id.* at 13 n.1, that an extradited person could remain forever civilly immune is fanciful. The civil immunity has always been recognized as ending after the extradited person has had a reasonable opportunity to return home. See, *e.g., Adamy* v. *Parkhurst, supra.* Respondent himself recognizes this when he acknowledges elsewhere, *id.* at 16, that "Respondents are free to . . . obtain jurisdiction over him in this country once the protection afforded by the rule of specialty expires." Currently a sentence of probation requires petitioner to remain in the United States.

JOINT

APPENDIX

Supreme Court, U.S.
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No. 87-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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v.

ROGER BIARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 27, 1987
CERTIORARI GRANTED NOVEMBER 9, 1987

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-7378-PAR (JRx)

ROGER BIARD,

Plaintiff,

v.

ALAN H. BLAIR, MONIQUE MAT, GERALD L. BILTON, WILFRIED VAN CAUWENBERGHE and THREE B INVESTMENT ASSOCIATES,

Defendants.

DOCKET ENTRIES [*]

Date	Nr.	Proceedings
11-12-85	jcw	1. Complt. Issd Summs. DEMAND FOR J/T. Case maybe ref'd to Mag Reichmann for dscvry.
11-20-85	sh	2. Applic to deposit cahs bond in interst bearing acct declrtn of Percy Anderson in suppt.
11-18-85	sh	3. Exh B to Cmplnt.
11-20-85	sh	4. 1ST AMENDED CMPNT DEMAND FOR JURY TRIAL. Pltf R Biard. Issd sms on 1st a/c.
11-12-85	sh	5. Ex Parte applic for writ of attachmnt granted. mot to set aside writ of attachmnt shall be heard 11-15-85 at 9am MO
11-13-85	sh	6. Notc of attachmnt.
11-12-85	sh	7. Applic for Right to attach ord for issu of writ of attachmnt Temp protec ord against property of non resid.

[* Abbreviations and misspellings are as in original.]

Date		Nr.	Proceedings
11-29-85	sh	8.	REPORT OF FUNDS ON DEPOSIT.
12-27-85	sh	9.	OSC RE: lack of diversity citizenship 1-24-86 re: plt may fl an amended cmpnt. OSC for hrg on 2-10-86 10am
11-25-85	sh	10.	Ord directing the clerk of the US Dist Crt to deposit cash bond in an interest bearing acct.
1-7-86	sh	11.	OSC Re: lack of diversity Citizenship pltf to fl 1st amended cmpnt 1-27-86. DEFTS may fl stamnt of positions & P/A on the issu 2-3-86. hrg 2-10-86 10am defts to resp to amended cmplnt within 20 days. after serv.
1-29-86	sh	12.	Prae Issd Alias Summs on 1st A/C.
1-30-86	esl	13.	Fld Ord for the creation of the civil cal of Judge J. SPENCER LETTS. Case transferred fr cal of Judge Pamela Ann Rymer to cal of Judge J. Spencer Letts for all fur procdgs.
2-10-86	sh	14.	Proof of serv acknowledgmnt of serv 1-29-86 1st amended cmpnt et al Alan H Blair.
		15.	Proof of serv acknowledgmnt of serv 1-29-86 1st amended cmpnt et al Gerald L Bilton
2-10-86	sh	16.	Proof of serv acknowledgmnt of serv 2-5-86 1st amended cmpnt et al Wilfried Cauwenberghe.
2-6-86	sh	17.	Applic for writ of attachmnt & TRO Granted.
2-6-86	sh	18.	Applic for add writ of attachmnt
11-25-85			Open Money Market Acct.

Date		Nr.	Proceedings
2-25-86	sh	19.	Request to ent default of deft Alan H. Blair; declrtn of Percy Anderson In suppt.
2-25-86	sh	20.	Default by Clerk against Alan H. Blair.
2-27-86	sh	21.	REQUEST TO ENTER DEFAULT OF DEFT WILFRIED VAN CAUWENBERGHE: DECLRTN OF PERCY ANDERSON IN SUPPT.
2-27-86	sh	22.	DEFAULT BY CLERK AGAINST WILFRIED VAN CAUWENBERGHE.
2-25-86	sh	23.	Applic for leave to appear specially pro hac vice LODGED ORD & MOT.
2-27-86	sh	24.	Memo of P/A in suppt of mot to dismiss; exh
2-27-86	sh	25.	Notc of mot mot to dismiss 4-28-86 10am
2-27-86	sh	26.	Ord granting leave to appear specially pro hac vice.
2-27-86	sh	27.	Notc of fl.
4-3-86	sh	28.	Mot to strike request to ent default; mot to set aside default; Request for sanc; declrtn of John G Kester LODGED ORD.
4-1-86	sh	29.	Stip & Agreement for exten of ti to fl ans by deft Gerald L Bilton & prop ord. 4-14-86
4-15-86	sh	30.	ANS TO CMPNT & DEMAND FOR JURY TRIAL. DEFT GERALD L BILTON.
4-14-86*	dc	31.	Pltf Roger Biard's opp to dft Van Cauwenberghe's mtn to strike reqst to enter dflt & reqst fr sanctns; memo P&A; dclrtn of Percy Anderson & exhs.

Date		Nr.	Proceedings
	dc	32.	Pltf Roger Biard's opp to dft Van Cauwenberghe's mtn to dism; memo P&A; dclrtns of Percy Anderson & Sheryl Ritchey in suppt thereof & exhs. pltf.
	dc	33.	Dclrtn of Janice C. Woods in suppt of plt's opp to mtn to dism. pltf.
4-22-86	sh	34.	Reply in suppt of mot to dismiss, declrtn of John G Kester.
4-22-86	sh	35.	Reply in suppt of mot to strike request to ent default & to set aside default & for sanc; declrtn of John G. Kester.
4-24-86	sh	36.	NOtc of fl 4-28-86 1pm.
4-24-86	dc	37.	MO: ORD tht dft's mtn to dism & set aside dflt fld by dft Cauwenbergh & ntcd fr hrg on 4-28-86 is tkn undr submssn w/out oral argumt; no apprnc by cnsl shl be nec on tht date.
5-22-86	dc	38.	MO: a mand informal conf has been set on 6-13-86, 10:30am in rm 204A.
6-2-86	sh	39.	notc of fl.
6-13-86	sh	40.	ORD for jury trial: discvry cut off 8-13-86 PTC 9-15-86 10:30am
6-13-86	sh	41.	MO: Informal stat confer Crt Ords default entry of deft Cawenberghe set aside. fld & dist ORD re J/T DCO set 8-13-86 PTC set on Cal 9-15-86 10:30 am
6-27-86	sh	42.	Notc of taking depo of deft Wilfried Van Cauwenberghe. 7-8-86 10am
7-21-86	sh	43.	Notc of taking depo of Wilfried Van Cauwenberghe. 10am 8-5-86
9-10-86	sh	44.	Pltf Roger Biard's ex parte applic for an ord resched PTC & declrtn of Percy Anderson in suppt LODGED ORD

Date		Nr.	Proceedings
9-10-86	sh	45.	MO: PTC cont to 10-24-86 9 am
9-15-86	sh	46.	prop ord resched the ptc & discvry cut off ptc 12-15-86 9:30am discv 11-15-86
10-28-86	sh	47.	stip for cont of PTC 3-27-87 discvry cut off 3-9-87.
10-28-86	sh	48.	prop ord for cont of ptc. 3-27-87 discvry cut off 3-9-87
11-12-86	sh		LODGED PROP ORD FWD TO CRD.
11-17-86	sh	49.	exceptions to prop ord.
11-17-86	sh	50.	prop ord denying deft Wilfried Van Cauwenberghe's mot to dismiss pltfs first amended cmplnt & Granting defts Wilfried Van Cauwenberghe's mot to set aside default.
12-9-86	sh	51.	notc of mt for s/j memo of p/a etc. 1-12-86 1pm LODGED PROP STATMNT OF UNCON FACTS & CONCL OF LAW LODGED PROP S/J
12-10-86	sh	52.	Supplmntal proof of serv; 12-9-86 notc of mot for s/j etc. wilfried Van Cauwenberghe c/o Mr James Allen Wilfried Van Cauwenberghe c/o JohnG Kester
12-10-86	sh	53.	supplmntal proof of serv 12-10-86 prop statmnt of uncon findings etc to Wilfried Van Cauwenberghe C/O Mr James Allen Wilfried Van Cauwenberghe c/o John G Kester
12-10-86	sh	54.	Supplmntal proof of serv 12-10-86 prop judgmnt. etc. Wilfried Van Cauwenberghe c/o Mr James Allen Wilfried Van Cauwenberghe c/o John G Kester
12-15-86	vg.	55.	Deft's NOTC OF APPEAL to 9th Cir. C/A frm ord fld 11-17-86. $70.00 flng & doc fee pd.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 86-6735

ROGER BIARD
Plaintiff

v.

ALAN H. BLAIR, et al
Defendant

and

WILFRIED VAN CAUWENBERGHE
Defendant-Appellant

GENERAL DOCKET

DATE	PROCEEDINGS
12/24/86	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. (jhc)
1/9/87	Filed as of 1/5/87 appellant's Civil Appeals Docketing Statement served on 1/2/87. (to CONFATT) [86-6735] (gb)
1/23/87	Filed order CONFATT (NPV) within 14 days of the entry of this order, aplt shall withdraw this apeal or show cause why it should not be dismissed for lack of jurisdiction. Pltf may have 10 days to reply to aplt's response. If aplt does not comply with this order, the appeal will be dismissed by the Clk under 9th Cir. Rule 19(b). [86-6735] (rc)

DATE	PROCEEDINGS
2/6/87	Filed Appellant Wilfried Van Cauwenberghe's response to order to show cause w/appendix. (2/6) (CONFATT) [86-6735] (jlc)
2/17/87	Filed as of 2/12/87 CERTIFICATE OF RECORD on appeal. (N/T) [86-6735] (ru)
2/19/87	Filed Roger Biard reply to response to OSC; memorandum in of points and authorities. (confatt) served on 2/17/87. [86-6735] (ec)
2/23/87	Filed Appellant Wilfried Van Cauwenberghe's motion for leave to file reply in support of his response to OSC. (confatt) served on 2/20/86 [103558] (ec)
2/23/87	Recvd aplt's reply in support of response to OSC. 2/20 (confatt) [86-6735] (ec)
7/7/87	Order filed (Judges BROWNING, ALARCON, THOMPSON) this appeal is dismissed for lack of jurisdiction. (jlc) [Entry date 7/8/87]
7/7/87	JS-34 disposition reported. Procedural termination after other judicial action—Jurisdictional Defects [86-6735] (jlc) [Entry date 7/8/87]
7/29/87	MANDATE ISSUED [86-6735] (jw)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-7378 PAR (JRx)

ROGER BIARD,

Plaintiff,

v.

ALAN H. BLAIR, MONIQUE MAT, GERALD L. BILTON, WILFRIED VAN CAUWENBERGHE, and THREE B INVESTMENT ASSOCIATES,

Defendants.

[Filed Nov. 12, 1985]

COMPLAINT FOR DAMAGES, FOR COMMON LAW FRAUD, BREACH OF CONTRACT, UNJUST ENRICHMENT, BREACH OF COVENANT OF FAIR DEALING, AND WRONGFUL DENIAL OF THE EXISTENCE OF A CONTRACT

DEMAND FOR JURY TRIAL

Plaintiff, Roger Biard (hereinafter "Biard"), for his complaint against the defendants, and each of them, named herein, alleges as follows:

PARTIES

1. Biard is, and at all relevant times hereinafter mentioned was, a citizen of Belgium.

2. Defendant Alan H. Blair (hereinafter "Blair"), is, and at all relevant times hereinafter mentioned was, an

individual residing in Los Angeles County, within the Central District of California and is subject to the jurisdiction of this court.

3. Defendant Gerald L. Bilton (hereinafter "Bilton"), is, and at all relevant times hereinafter mentioned was, an individual residing within the Central District of California and is subject to the jurisdiction of this court.

4. Defendant Wilfried Van Cauwenberghe (hereinafter "Van Cauwenberghe"), is, and at all relevant times hereinafter mentioned was, a citizen of Belgium and is subject to the jurisdiction of this court.

5. Defendant Montique Mat (hereinafter "Mat"), is, and all relevant times hereinafter mentioned was, a resident of Los Angeles, California, a citizen of Belgium, and subject to the jurisdiction of this court.

6. Defendant Three B Investment Associates is, and at all relevant time hereinafter mentioned was, an unincorporated and unregistered entity, subject to the jurisdiction of this court. It was formed ostensibly for the purchase of Concorde Bridge Townhouses by defendants Blair, Bilton and Van Cauwenberghe.

OTHER ENTITIES

7. Concorde Bridge Townhouses (hereinafter "Concord Bridge"), is, and at all relevant times hereinafter mentioned was, a residential apartment complex owned by EES Kabid, a Texas limited partnership, and by Prudential Insurance Company of America. Concorde Bridge is located near Kansas City, in Overland Park, Kansas.

8. Fides Societe Fiduciare is, and at all relevant times hereinafter mentioned was, a trust company and a subsidiary of Credit Suisse, a banking institution headquartered in Switzerland. Fides Societe Fiduciare is located in Geneva, Switzerland.

9. Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V., were Netherlands Antilles corporations controlled by defendants Blair, Van Cauwenberghe, and Mat. Hexagonal Valley, N.V., of which defendant Mat was the majority owner, served as a depository for monies obtained by defendants Blair, Bilton, and Van Cauwenberghe.

ALTER EGO ALLEGATION

10. Defendant Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. are, and at all relevant times hereinafter mentioned were, alter egos of one another and of defendants Blair, Bilton, Van Cauwenberghe and Mat. Biard is informed and believes, and thereupon alleges, that defendant Blair and Mat directed the business operations of Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. for their own personal benefit. Defendants Blair and Mat have exercised total dominion and control over Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. and have intermingled their personal and financial affairs with those of Three B Invesment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. There exits [*sic*] such a unity of interest and ownership between Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., Swiebel, N.V. and defendants Blair Van Cauwenberghe, Bilton and Mat that any individuality and separateness has ceased to exist. Adherence to the fiction of the existence of Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. as entities separate and distinct from defendants Blair, Van Cauwenberghe, Bilton and Mat would permit an abuse of the corporate privilege and sanction fraud and promote injustice to Biard. Therefore, defendants Blair, Van Cauwenberghe, Bilton and Mat are the *alter egos* of defendant Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. and are responsible for the debts, liabilities, and actions of defendant Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V.

NATURE OF THE ACTION

13. In or about July 1979, defendants Blair, Bilton, Van Cauwenberghe and Mat devised and intended to devise and employ a scheme and artifice to defraud clients and creditors of defendant Three B Investment Associates and other members of the public and to obtain money and property by means of false and fraudulent representations and promises, under the guise of a condominium development known as Concorde Bridge.

14. To accomplish their fraudulent purposes, defendants Blair, Bilton, Van Cauwenberghe and Mat engaged and caused other persons to engage in various acts, practices and transactions which enabled them (a) to induce numerous individuals to invest approximately $3.6 million in real estate that was never purchased; (b) to divert and misappropriate the monies invested for their own personal benefit, and for the benefit of their acquaintances; (c) to misrepresent the financial condition of defendant Three B Investment Associates by making it appear that the entity held an interest in valuable real estate when in fact it did not; (d) to conceal their unlawful activities by, among other things, using funds contributed by some investors to pay pretended returns on investments; and to conceal the proceeds of their fraudulent scheme through a network of foreign bank and trust accounts in Fides Societe Fiduciare, and shell companies, including, but not limited to Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. Defendants carried out this fraudulent scheme in the following manner:

15. Defendants, and each of them, caused the formation of defendant Three B Investment Associates to engage in negotiations and to enter into an ostensible contract of sale with the owners of Concorde Bridge, in or-

der to create the appearance that the defendants owned Concorde Bridge. Thereafter, defendants falsely represented to Biard and others that they owned Concorde Bridge through defendant Three B Investment Associates and that they were in need of funds to convert Concorde Bridge into condominium units.

16. By means of various false and fraudulent representations, promises and the concealment of material facts, as described more specifically below, defendants caused and induced Biard to enter into a loan agreement in which he loaned $1 million to Three B Investments for the conversion of the Concorde Bridge apartments into condominium units. In pertinent part, the terms and conditions of the loan agreements provided that defendants, through defendant Three B Investment Associates, would repay the loan in yearly installments over a three year period with the final payment of $600,000 payable in 1982.

17. Thereafter, defendant Bilton on behalf of the defendants, through defendant Three B Investment Associates executed a written promissory note and a mortgage purportedly granting Biard a security interest in Concorde Bridge. (The promissory note and mortgage documents and all exhibits and attachments thereto are hereafter collectively referred to as the "Loan Agreement.") A true and correct copy of the Loan Agreement is attached hereto as Exhibit A and incorporated herein as though fully set forth. Said agreement provides for reasonable attorneys' fees in the event of the borrower's default.

18. In 1982, the final installment of the $1 million note came due and payable, but defendants, and each of them, have failed and refused, and continue to fail and refuse without just cause, to pay the sums due and owing.

19. Defendants Blair, Bilton, and Van Cauwenberghe, by there [*sic*] conduct as alleged herein violated the Racketeer Influenced and Corrupt Organizations Act. The aforementioned defendants and defendants Mat and Three B Investment Company, by their conduct, have also violated common law. As a result of these violations, plaintiff seeks rescission of the Loan Agreement, including the return of all cash invested, a declaratory judgment that the promissory note executed by the plaintiff, is null and void, or damages as a rescissional equivalent. Further, plaintiff seeks a declaratory judgment that defendants are jointly and severally liable to the plaintiff for any damages he has sustained. In addition, plaintiff seeks an award in the amount of threefold the damages suffered by him, in accordance with the provisions of Section 1964 of RICO, exemplary damages, attorneys' fees and costs.

JURISDICTION AND VENUE

20. The plaintiff's claims arise under an act of Congress regulating commerce. The jurisdiction of this court is therefore invoked pursuant to 18 U.S.C. § 1964(b) and (c), the Racketeer Influenced and Corrupt Organizations Act. The venue of this proceeding is in this Court pursuant to 28 U.S.C. § 1391(b) and (d).

FIRST CLAIM FOR RELIEF

(RICO Treble Damage Claim)

21. This is an action against defendants Blair, Bilton, and Van Cauwenberghe for treble damages pursuant to RICO, 18 U.S.C. § 1964(b) and (c).

22. Plaintiff realleges and incorporates by reference paragraphs 1 through 20, inclusive, of this Complaint as if set forth verbatim herein.

23. Beginning in or about July 1979, defendants Blair, Bilton, and Van Cauwenberghe, doing business as Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. being employed by and

associated with enterprises engaged in and the activities of which affected interstate and foreign commerce, willfully and knowingly did conduct and participate, directly and indirectly, in the conduct of the affairs of such enterprises through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

24. The enterprises whose affairs were conducted through a pattern of racketeering activity was, at all times material hereto, an association in fact made up of corporations, individuals and legal entities as defined in 18 U.S.C. § 1961(4). Said enterprises were made up of defendants Alan H. Blair, Gerald L. Bilton, and Wilfried Van Cauwenberghe, doing business as Three B Investment Associates, Inc., Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V.

25. The pattern of racketeering activity engaged in by the defendants, as defined in 18 U.S.C. § 1961(1)(B) and (5), consisted of the following:

a. Acts of wire fraud in violation of 18 U.S.C. § 1343, and those specific acts of mail fraud alleged in Count 2 of the Indictment in *United States v. Blair, et al.*, Case No. 84-963 AAH (C.D. Cal 1984), the allegations of which are hereby incorporated by reference as though fully set forth herein;

b. Acts of the interstate transportation of stolen property in violation of 18 U.S.C. § 2314, and those specified acts of interstate transportation of stolen property alleged in Count 1 of the aforementioned Indictment, the allegations of which are hereby incorporated by reference as though fully set forth herein.

26. On October 11, 1984, a Federal Grand Jury for the Central District of California returned an Indictment No. 84-963 against defendants Alan H. Blair, Gerald L. Bilton, and Wilfried Van Cauwenberghe. A copy of that Indictment is attached hereto as Exhibit B.

The allegations of that Indictment at [*sic*] hereby incorporated by reference as though set forth in full herein.

27. By reason of defendants' violation of 18 U.S.C. § 1962(c), as described above, plaintiff was injured in its business and property in the amount to be proven at trial, which is not less than $1,800,000 together with interest thereon at the full legal rate.

SECOND CLAIM FOR RELIEF

(Common Law Fraud)

28. The allegations against all defendants set forth in this Second Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

29. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 20, inclusive, of this complaint as if set forth verbatim herein.

30. During 1979, defendants, individually and in concert, and also each participating with or aiding and abetting and conspiring with the other, induced Biard to grant to them a $1 million loan by willfully or recklessly making misrepresentations of material facts and by omitting to disclose material facts necessary to prevent the statements made from being deceptive and misleading, including, but not limited to, the following material misrepresentations and omissions set forth below:

(a) It was represented that Biard's funds would be used by defendant Three B Investment Associates for the conversion of Concorde Bridge to condominium units. In fact, as defendants well knew but concealed from Biard, they never caused the conversion of Concorde Bridge into condominium units, but misappropriated and diverted Biard's money for other purposes.

(b) It was represented that defendant Three B Investment Associates had completed negotiations and had purchased Concorde Bridge. In fact, as defendants well knew but concealed from Biard, negotiations for the purchase of the property had not been completed and defendant Three B Investment Associates had not purchased Concorde Bridge.

(c) It was represented that defendant Blair had personally invested and had caused defendant Three B Investment Associates to invest substantial amounts in the purchase of Concorde Bridge. In fact, as defendants well knew but concealed from Biard, neither defendant Blair nor defendant Three B Investment Associates had actually substantially invested in the purchase of Concorde Bridge.

(d) It was represented that Biard's funds would be secured by virtue of a mortgage on the Concorde Bridge realty. In fact, as defendants well knew but concealed from Biard, his funds were not secured by a mortgage on the Concorde Bridge property or in any other manner, but were deposited, allocated and disbursed according to the personal whims and designs of defendants and misappropriated and diverted for their benefit, and for the benefit of defendant Three B Investment Associates.

31. In order to deceive and lull Biard into believing that his funds had been invested as represented, to prevent him from complaining to governmental agencies, and to further induce him to invest in other investment programs, defendants caused yearly payments to be made to Biard, falsely representing that these payments represented financial returns from the Concorde Bridge condominium conversion.

32. Biard reasonably relied upon information communicated to him by defendants and each of them, as hereinabove represented.

33. Defendants conduct, as aforesaid, constitutes fraud and deceit, by reason of which Plaintiff has suffered damages. As a result, Biard has been damaged by defendants, and each of them, in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

34. In conducting themselves, as described above, defendants, and each of them, have acted willfuly, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendants, and each of them, in the sum of $5,000,000.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

35. The allegations against all defendants set forth in this Third Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

36. Plaintiff realleges and incorporates by reference paragraphs 1 through 20, inclusive, of this Complaint as if set forth verbatim herein.

37. On or about November 11, 1979, Biard entered into a written agreement with defendants, and each of them, through defendant Three B Investment Associates, whereby Biard agreed to loan of $1 million to defendant Three B Investment Associates. A true and correct copy of the Loan Agreement is attached hereto as Exhibit A and incorporated herein as though fully set forth.

38. In pertinent part, the terms and conditions of the Loan Agreement provided that in exchange for Biard's loan of $1 million, defendant Three B Investment Associates promised to repay the loan over a three year period at 20 per cent per annum, including $165,000 the first year, $235,000 the second year, and $600,000 the third

year. The promise to pay was to be secured by defendant Three B Investment Associates' ownership interest in Concorde Bridge.

39. Defendants, and each of them, and continue to fail and refuse without just cause, to deliver to Biard the final payment due and owing under the Loan Agreement.

40. Biard has duly performed each and every condition, covenant and promise under the Loan Agreement to be performed on his part, except to the extent that he was prevented or excused from such performance, or said condition, covenant and promise has occurred or been waived.

41. Biard has demanded that the defendants, and each of them, deliver the money they borrowed pursuant to the Loan Agreement, but defendants, and each of them, have failed and refused, and continue to fail and refuse without just cause, to repay said money.

42. As a direct and proximate result of defendants', and each of them, failure and refusal as alleged herein, Biard has been damaged by defendants, and each of them, in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

FOURTH CLAIM FOR RELIEF

(Unjust Enrichment)

41. The allegations against all defendants set forth in this Fourth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

42. Plintiff realleges and incorporates by reference paragraphs 1 through 20, inclusive, and 37 through 41, inclusive, of this Complaint as if fully set forth herein.

43. Within four years preceding the commencement of this action, defendants, and each of them, came into possession of money belonging to Biard. The total value of said money was in excess of $600,000, which was justly due to Biard but which has never been paid by defendants, and each of them.

44. Defendants, and each of them, continued failure to pay such money has operated to the unjust enrichment of defendants, and each of them, so that defendants, and each of them, are under a duty to pay to Biard the total value of such money in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

FIFTH CLAIM FOR RELIEF

(Breach of the Covenant of Good Faith and Fair Dealing)

45. The allegations against all defendants set forth in this Fifth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

46. Plaintiff realleges and incorporates by reference paragraphs 1 through 20, inclusive and paragraphs 37 through 41, inclusive of this Complaint as if fully set forth verbatim herein.

47. Every agreement contains an implied covenant that both parties thereto will act in good faith and deal fairly with the other party to the agreement. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by refusing to honor and perform their obligations under the Loan Agreement on pretextural [*sic*] and fraudulent grounds.

48. An implied covenant in the Loan Agreement was that defendants, and each of them, would make every reasonable effort to perform each of their obligations

under the Loan Agreement. Defendants, and each of them, breached these covenants by refusing to make any effort to repay the loan in its entirety. Defendants, and each of them, knew the significant and substantial damages which Biard would suffer if the loan was not repaid in a timely manner.

49. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by refusing to honor and perform their obligations under the Loan Agreement. As a direct and proximate result of defendants', and each of them, breach of the implied covenant of good faith and fair dealing, Biard has been damaged in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

50. In doing each of the acts alleged herein, defendants, and each of them, acted willfully, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendant, and each of them, in the sum of $5,000,000.

SIXTH CLAIM FOR RELIEF

(Denial of the Existence of a Contract)

51. The allegations against defendants Blair and Van Cauwenberghe set forth in this Sixth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

52. Plaintiff realleges and incorporates by reference paragraphs 1 through 20, and paragraphs 37 through 41, inclusive, of this Complaint as if fully set forth verbatim herein.

53. Defendants Blair and Van Cauwenberghe now contend that they were not members or partners of de-

fendant Three B Investment Associates and thus were not parties to the Loan Agreement. This position has been taken and asserted by defendants Blair and Van Cauwenberghe in bad faith and without probable cause, and a result, defendants Blair and Van Cauwenberghe are, therefore, subject to liability in tort.

54. The tortious denial by defendants Blair and Van Cauwenberghe of their obligations under the Loan Agreement has directly and proximately caused Biard to be damaged in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

55. In denying the existence of their obligations under the Loan Agreement, defendants Blair and Van Cauwenberghe have acted willfully, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendants Blair and Van Cauwenberghe, and each of them, in the sum of $5,000,000.

WHEREFORE, Biard prays for judgment against the defendants, and each of them, as follows:

A. On the First Claim for Relief:

1. For treble damages according to proof at trial in an amount not less than $1,800,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

B. On the Second Claim for Relief:

1. For rescission of the Loan Agreement, including a return to plaintiff of all cash invested, and a declaratory judgment that the promissory note, mort-

gage, and all other documents executed by plaintiff in connection with the loan to defendant Three B Investment Associates, are null and void, or for damages as a rescissional equivalent;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

C. On the Third Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

D. On the Fourth Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

E. On the Fifth Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

F. On the Sixth Cause of Action:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby request trial by jury of all issues permitted by law to be submitted to the jury.

DATED: This 12th day of November, 1985.

BRYAN, CAVE, MCPHEETERS
& MCROBERTS
ALBERT GOLBERT
ANNIE K. BAKER

By /s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

[Exhibits omitted in printing]

VERIFICATION

STATE OF CALIFORNIA,

COUNTY OF CALIFORNIA [*sic*]

I, the undersigned, declare (check and complete applicable paragraphs):

☒ I am a party to this action. I have read the foregoing Complaint and know its contents. The matters stated in it are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

☒ (Federal) I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 1985

/s/ Roger Biard
ROGER BIARD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR WRIT OF ATTACHMENT AND TEMPORARY PROTECTIVE ORDER AND DECLARATIONS OF ROGER BIARD, PERCY ANDERSON, AND MICHAEL E. SCHULTZ

[Filed Nov. 12, 1985]

Date: November 12, 1985

Time: 1:30 p.m.

Plaintiff, Roger Biard, hereby applies *ex parte* for an application for issuance of a Writ of Attachment against the property, as described herein, of defendant Wilfried Van Cauwenberghe, which is presently in the possession of the Clerk of the United States District Court for the Central District of California, or in the alternative, for a Temporary Protective Order enjoining the Clerk of the United States District Court from transferring said property to defendant Wilfried Van Cauwenberghe or his agents pending a noticed hearing on the Writ of Attachment. This application is based on the attached Memorandum of Points and Authorities, the attached declarations, the complaint on file herein, and such other argu-

ment and evidence that may be presented at any hearing on the application.

* * * *

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

Plaintiff, Roger Biard, has filed this suit to recover damages for, *inter alia*, fraud and breach of contract by defendant Wilfried Van Cauwenberghe. The defendants in the instant case are also charged in a federal criminal indictment with wire fraud, interstate transportation of stolen property, and conspiracy in violation of 18 U.S.C. §§ 3143, 2314, and 371. *See United States v. Blair, et al.*, CR 84-983 AAH. A copy of the indictment is attached hereto as Exhibit A. They are alleged to have obtained by fraud over $3 million from two Belgium nationals, including $1 million from plaintiff Roger Biard. The criminal trial is presently scheduled to commence on November 19, 1985, before Senior United States District Judge A. Andrew Hauk.

When Van Cauwenberghe, a Belgium national, was arrested in Geneva, Switzerland, various of his assets were seized pursuant to Article XII of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. Among the assets seized and forwarded to this country were two stock certificates representing Van Cauwenberghe's shares of stock in two Panamanian companies, Abamar and Batimar. The stock is valued at approximately $700,000. The stock certificates are presently in the registry of the United States District Court for the Central District of California.

Pursuant to Rule 41 of the Federal Rules of Criminal Procedure, Van Cauwenberghe filed a motion before the district court for the return of his stock certificates. On October 1985, the district court continued the motion until November 12, 1985, but ruled that unless the government demonstrates that the stock certificates are evidence in the criminal proceeding, it intends to return the stock certificates to Van Cauwenberghe.

Purusant to §§ 492.010 and 485.210 of the California Code of Civil Procedure, plaintiff seeks an *ex parte* order for issuance of a writ of attachment (nonresident) or, in the alternative, a temporary protective order in the event the district court orders the stock certificates returned to Van Cauwenberghe. Van Cauwenberghe has notified the district court that he intends to liquidate the stock in order to finance the defense of the criminal charges filed against him. *See* defendant's Motion for Return of Property, p. 60-61, attached hereto as Exhibit B.

* * * *

The facts relevant to a determination of the plaintiff's application are set forth in the indictment and the attached declarations of Roger Biard (hereinafter Biard declaration) and Michael E. Schultz (Schultz declaration).

In November 1979, Biard loaned $1 million to Van Cauwenberghe through Three B Investment Associates ostensibly to convert a complex of apartments known as Concorde Bridge Townhouses into condominiums.[1] Simultaneously, Biard received a written promissory note and a mortgage purportedly granting him a security interest in the apartment complex. The note was for a term of three years with payments to be made annually. The payments for 1980 and 1981 were made, but the 1982 installment of $600,000 has never been paid despite Biard repeated demands for payment. The mortgage securing the note is worthless inasmuch as Three B Investment

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[1] Three B Investment Associates is an unincorporated and unregistered entity formed by defendants Blair, Bilton and Van Cauwenberghe.

Associates never owned Concorde Bridge Townshouses.[2] The promissory note and mortgage are attached as Exhibit C.

The Van Cauwenberghe stock certificates are described and identified in the Biard Declaration. A showing the Van Cauwenberghe property is subject to an *ex parte* writ of attachment is set forth in the attached Biard Declaration. Said property is presently in the possession of the Clerk of the United States District Court for the Central District of California.

* * * *

Prejudgment attachment is particularly appropriate in this case—the Abamar and Batimar stock certificates owned by Van Cauwenberghe are within the territorial jurisdiction of this court, the claim is for money loaned, the amount of money at stake is not, and could hardly be in dispute, the security is valueless inasmuch as Three B Investment Associates never owned Concorde Bridge Townhouses, and Van Cauwenberghe's conduct was clearly in a business context. Moreover, there is a strong probability that Biard will prevail on the merits.

Biard is entitled to prejudgment attachment. Van Cauwenberghe and his associates have blatantly ignored their obligations under the promissory note and have refused to repay their loan even though Biard is entitled to payment. Since Van Cauwenberghe and his associates never had any intention of honoring their obligations under the promissory note, Biard has been forced to seek the court's assistance in obtaining the return of his funds. There can be no clearer example of a commercial transaction in which prejudgment attachment is both appropriate and necessary. As provided by Section

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[2] In 1980, Three B Investment Associates sold the Concorde Bridge Townhouses to Roger Van den Stock for $2.6 million even though they had never acquired title to the property. *See* indictment, *United States v. Van Cauwenberghe, et al.*, CR 84-983 AAH.

488.450 of the California Code of Civil Procedure, Van Cauwenberghe's stock certificates may be levied by the levying officer by serving the Clerk of the Court with a copy of the writ and notice of attachment.

* * * *

[Filed Nov. 12, 1985]

DECLARATION OF ROGER BIARD

I, Roger Biard, declare as follows:

1. I am a citizen of Belgium and a resident of Brussels.

2. I am the founder and senior partner of a stock brokerage firm in Brussels, Biard & Company, established in 1967.

3. I have personal knowledge of the following facts or I have obtained the facts from my review of the documents and records I maintained in the ordinary course of business and, if called as a witness, I could and would competently testify to such facts under oath. This declaration is in support of my application for an ex parte order for issuance of a Writ of Attachment or, in the alternative, for a temporary protective order, pursuant to Rule 64 of the Federal Rules of Civil Procedure and §§ 481.010-492.090 of the California Code of Civil Procedure.

4. In 1979 I was approached by Wilfried Van Cauwenberghe, a member of a Brussels family well known to me and my family. Van Cauwenberghe suggested that I advise him when I had plans to visit the United States on other matters. In about September of 1979, I told Van Cauwenberghe that I would be travelling to the United States in October 1979 and he invited me to come to Los Angeles, California, to discuss some business proposals.

5. On or about October 20, 1979, I travelled by airline from Atlanta, Georgia, to Los Angeles, California, where I was met by Van Cauwenberghe and his brother. Van Cauwenberghe introduced me to a person by the name of Alan H. Blair. Blair told me that he was a retired United States Air Force general and that he was the owner of pharmaceutical companies in Los Angeles and in Germany.

6. During my stay in Los Angeles I learned for the first time about a real estate transaction in Kansas called Concorde Bridge Townhouses. I was told by Blair and by Van Cauwenberghe that they were members of a group, Three B Investment Associates, which owned this property and that they were converting it into condominium units for resale. Blair and Van Cauwenberghe told me that they needed funds to complete this conversion and I was asked to grant them a loan for $1.5 million. Because I lacked sufficient funds to make a loan of that amount, I declined but I did agree to make a loan of $1 million.

7. Before I left Los Angeles, I gave Van Cauwenberghe my check in the amount of $1 million. I dated my check November 11, 1979, because my funds, which were in a revolving interest bearing account, would not be available until then.

8. In exchange for my check I was given a promissory note and mortgage from Three B Investment Associates. I noticed that the documents were signed by a "Jerry Bilton" as managing partner. I asked Blair to explain why the documents were signed by this Bilton, a man I did not know. Blair told me that Bilton was his associate in the Concerde Bridge apartment investment and that Bilton was in charge of the project of converting it into condominium units. Blair also said that the note and mortgage would be notarized in Kansas City and sent to me in Brussels. A copy of the promissory note and mortgage are attached as Exhibit C.

9. Blair thanked me for my loan, said that it was a sound business decision and that in the future he would have other projects in which I could invest as a principal.

10. After my return to Brussels I received the fully-executed and notarized note and mortgage documents for my $1 million loan. The note was for a term of three

years with payments to be made each year. The payments for 1980 and 1981 were made but when the 1982 payment of $600,000, the final installment, became due, it was not paid. When I asked Blair about this final payment, he suggested that I permit him to invest the amount owned in another of his investments. I refused to agree to this and again requested both Blair and Van Cauwenberghe to make the final payment. To this date I have not received the repayment of the loan.

11. After Blair and Van Cauwenberghe failed to make the final payment of this loan, I determined through my own inquiries that Blair, Van Cauwenberghe and their group had never owned Concorde Bridge Townhouses. I also determined that my check was deposited at Fides, a trust company in Geneva and that the funds from my check were transferred to a bank account in Los Angeles, California, under the control of Alan H. Blair.

12. This action was commenced by the filing of a verified complaint on November 12, 1985. I am familiar with the facts set forth in the Complaint. To the best of my knowledge each of the facts set forth therein is true and, on the basis of said facts, I believe that I am entitled to recover the sums prayed for therein.

13. I seek the issuance of this order without prior notice to defendant Wilfried Van Cauwenberghe because of my concern and belief that if the Abamar and Batimar stock certificates are returned to Van Cauwenberghe, he will sell them and place them beyond the reach of this court. Therefore, if it were required that I wait to give notice to defendant Van Cauwenberghe and attend the results of a noticed hearing, I will suffer great or irreparable injury because in the interim the property sought to be attached will more likely than not be sold and the proceeds rendered unavailable to levy. I am informed and believe that no other assets of any of the defendants is available within the jurisdiction of this court.

14. I have known Wilfried Van Cauwenberghe for many years and am informed and believe him to be a resident of Brussels and a citizen of Belgium.

15. I am informed and believe that the stock certificates which I seek to have attached are currently in the possession of the registry of the United States District Court for the Central District of California. I am informed and believe that such stock is described as:

—registered certificate No. 19 from Abamar Corporation, Panama, representing 6.293% of its capital.

—registered certificate No. 15 from the Batimar Corporation, Panama, representing 19.659% of its capital.

16. I have no security interest in any property of any defendant to secure my claims in this action or any portion of said claims. The security interest which was purportedly given to me is of no value since the defendants did not own the property.

17. The attachment is sought for no purpose other than to preserve these assets for satisfaction of claims set forth in the verified complaint.

18. I am informed and believe that the property sought to be attached is property subject to attachment under California law and not exempt from attachment under California law.

19. My claims have not been discharged or stayed in any proceeding under the National Bankruptcy Act.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 12th day of November, 1985.

/s/ Roger Biard
ROGER BIARD

DECLARATION OF MICHAEL E. SCHULTZ

I, Michael S. Schultz, declare as follows:

1. I am an attorney licensed to practice in the State of New York and am a member of the firm of Ehrenkranz, Ehrenkranz & Schultz. My business office is located in New York City, New York.

2. I have personal knowledge of the following facts or I have obtained the facts from my review of the documents and records maintained by Ehrenkranz, Ehrenkanz & Schultz in the ordinary course of business and, if called as a witness, I could and would competently testify to such facts under oath.

3. This declaration is made in support of Roger Biard's *ex parte* application for a writ of attachment and temporary protective order.

4. Ehrenkranz, Ehrenkranz & Schultz represents EES Kabid Associates, a Texas limited partnership, and was empowered to conduct its business affairs, which consisted of ownership of the Concorde Bridge Townhouses, an apartment complex in Overland Park, Kansas.

5. EES Kabid Associates owned Concorde Bridge Townhouses from September, 1971 to August 1983; its ownership was subject to a mortgage held by Prudential Insurance Company of America.

6. Except for the mortgage interest held by Prudential, EES Kabid Associates did not sell or otherwise convey ownership interest in Concorde Bridge Townhouses during the period of its ownership.

7. In the summer of 1979, an entity known as Three B Investment Associates notified our office that it was interested in purchasing Concorde Bridge Townhouses. Shortly, thereafter, I began participating in a series of negotiations with Three B Investment Associates for a contract of sale for Concorde Bridge Townhouses. The identities of the principals of Three B Investment Associates were never revealed to me with the exception of the name of Jerold A. Bressel. Bressel was an attorney who was a member of a Kansas City law firm that represented Three B Investment Associates during my negotiations for the purchase of Concorde Bridge Townhouses.

8. On November 20, 1979, a contract of sale between EES Kabid Associates, the "Seller", and Three B Investment Associates, the "Buyer", was executed by the parties. In essence the contract called for Three B Investment Associates to purchase Concorde Bridge Townhouses from EES Kabid Associates for a purchase price of $8.5 million.

9. The November 20, 1979, contract was extended three times by agreement of the parties; the final extension of the contract provided that the sale be accomplished by August 4, 1980. By terms of an escrow entered into by the parties on June 19, 1980, failure by Three B Investment Associates to make the purchase by August 4, 1980, would result in the forfeiture to EES Kabid Associates of Three B Investment Associates' cash deposit of $150,000.

10. Three B Investment Associates failed to accomplish the purchase. On August 4, 1980, the contract of sale expired and the $150,000 deposit was forfeited to EES Kabid Associates. No other agreements were executed between the parties and in 1983, EES Kabid Associates sold Concord Bridge Townhouses to a buyer completely unrelated to Three B Investment Associates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of November, 1985, at Los Angeles, California.

/s/ Michael E. Schultz
MICHAEL E. SCHULTZ

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Nov. 20, 1985]

FIRST AMENDED COMPLAINT FOR DAMAGES, FOR COMMON LAW FRAUD, BREACH OF CONTRACT, UNJUST ENRICHMENT, BREACH OF COVENANT OF FAIR DEALING, AND WRONGFUL DENIAL OF THE EXISTENCE OF A CONTRACT

DEMAND FOR JURY TRIAL

Plaintiff, Roger Biard (hereinafter "Biard"), for his complaint against the defendants, and each of them, named herein, alleges as follows:

PARTIES

1. Biard is, and at all relevant times hereinafter mentioned was, a citizen of Belgium.

2. Defendant Alan H. Blair (hereinafter "Blair"), is, and at all relevant times hereinafter mentioned was, an individual residing in Los Angeles County, within the Central District of California and is subject to the jurisdiction of this court.

3. Biard is informed and believes and thereupon alleges that defendant Gerald L. Bilton (hereinafter "Bilton"), is, and at all relevant times hereinafter mentioned was, an individual residing within the Central District of California and is subject to the jurisdiction of this court.

4. Defendant Wilfried Van Cauwenberghe (hereinafter "Van Cauwenberghe"), is, and at all relevant times hereinafter mentioned was, a citizen of Belgium and is subject to the jurisdiction of this court.

5. Defendant Monique Mat (hereinafter "Mat"), is, and all relevant times hereinafter mentioned was, a resident of Los Angeles, California, a citizen of Belgium, and subject to the jurisdiction of this court.

6. Defendant Three B Investment Associates is, and at all relevant times hereinafter mentioned was, an unincorporated and unregistered entity, subject to the jurisdiction of this court. It was formed ostensibly for the purchase of Concorde Bridge Townhouses by defendants Blair, Bilton and Van Cauwenberghe.

OTHER ENTITIES

7. Concorde Bridge Townhouses (hereinafter "Concorde Bridge"), is, and at all relevant times hereinafter mentioned was, a residential apartment complex owned by EES Kabid, a Texas limited partnership, and by Prudential Insurance Company of America. Concorde Bridge is located near Kansas City, in Overland Park, Kansas.

8. Fides Societe Fiduciare is, and at all relevant times hereinafter mentioned was, a trust company and a subsidiary of Credit Suisse, a banking institution headquartered in Switzerland. Fides Societe Fiduciare is located in Geneva, Switzerland.

9. Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V., were Netherlands Antilles corporations controlled by defendants Blair and Mat. Hexagonal Valley, N.V., of which defendant Mat was the majority owner, served as a depository for monies obtained by defendants Blair, Bilton, and Van Cauwenberghe.

ALTER EGO ALLEGATION

10. Defendant Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. are,

and at all relevant times hereinafter mentioned were, alter egos of one another and of defendants Blair, Bilton, Van Cauwenberghe and Mat. Biard is informed and believes, and thereupon alleges, that defendant Blair and Mat directed the business operations of Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. for their own personal benefit and for the benefit of their acquaintances. Defendants Blair and Mat have exercised total dominion and control over Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. and have intermingled their personal and financial affairs with those of Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V. Swiebel, N.V., and defendants Van Cauwenberghe and Bilton. There exits [*sic*] such a unity of interest and ownership between Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., Swiebel, N.V., and defendants Blair Van Cauwenberghe, Bilton and Mat that any individuality and separateness has ceased to exist. Adherence to the fiction of the existence of Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. as entities separate and distinct from defendants Blair, Van Cauwenberghe, Bilton and Mat would permit an abuse of the corporate privilege and sanction fraud and promote injustice to Biard. Therefore, defendants Blair, Van Cauwenberghe, Bilton and Mat are the *alter egos* of defendant Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. and are responsible for the debts, liabilities, and actions of defendant Three B Investment Associates, Hexagonal Valley, N.V. Sante N.V., and Swiebel, N.V.

NATURE OF THE ACTION

11. In or about July 1979, defendants Blair, Bilton, Van Cauwenberghe and Mat devised and intended to devise and employ a scheme and artifice to defraud clients and creditors of defendant Three B Investment Associates and other members of the public and to obtain

money and property by means of false and fraudulent representations and promises, under the guise of a condominium development known as Concorde Bridge.

12. To accomplish their fraudulent purposes, defendants Blair, Bilton, Van Cauwenberghe and Mat engaged and caused other persons to engage in various acts, practices and transactions which enabled them (a) to induce numerous individuals to invest approximately $3.6 million in real estate that was never purchased; (b) to divert and misappropriate the monies invested for their own personal benefit, and for the benefit of their acquaintances; (c) to misrepresent the financial condition of defendant Three B Investment Associates by making it appear that the entity held an interest in valuable real estate when in fact it did not; (d) to conceal their unlawful activities by, among other things, using funds contributed by some investors to pay pretended returns on investments; and to conceal the proceeds of their fraudulent scheme through a network of foreign bank and trust accounts in Fides Societe Fiduciare, and shell companies, including, but not limited to Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. Defendants carried out this fraudulent scheme in the following manner:

13. Defendants, and each of them, caused the formation of defendant Three B Investment Associates to engage in negotiations and to enter into an ostensible contract of sale with the owners of Concorde Bridge, in order to create the appearance that the defendants owned Concorde Bridge. Thereafter, defendants falsely represented to Biard and others that they owned Concorde Bridge through defendant Three B Investment Associates and that they were in need of funds to convert Concorde Bridge into condominium units.

14. By means of various false and fraudulent representations, promises and the concealment of material facts, as described more specifically below, defendants caused and induced Biard to enter into a loan agreement

in which he loaned $1 million to Three B Investments for the conversion of the Concorde Bridge apartments into condominium units. In pertinent part, the terms and conditions of the loan agreement provided that defendants, through defendant Three B Investment Associates, would repay the loan in yearly installments over a three year period with the final payment of $600,000 payable in 1982.

15. Thereafter, defendant Bilton on behalf of the defendants, through defendant Three B Investment Associates executed a written promissory note and a mortgage purportedly granting Biard a security interest in Concorde Bridge. (The promissory note and mortgage documents and all exhibits and attachments thereto are hereinafter collectively referred to as the "Loan Agreement.") A true and correct copy of the Loan Agreement is attached hereto as Exhibit A and incorporated herein as though fully set forth. Said agreement provides for reasonable attorneys' fees in the event of the borrower's default.

16. In 1982, the final installment of the $1 million note came due and payable, but defendants, and each of them, have failed and refused, and continue to fail and refuse without just cause, to pay the sum due and owing.

17. Defendants Blair, Bilton, and Van Cauwenberghe, by their conduct as alleged herein violated the Racketeer Influenced and Corrupt Organizations Act. The aforementioned defendants and defendants Mat and Three B Investment Associates, by their conduct, have also violated common law. As a result of these violations, plaintiff seeks rescission of the Loan Agreement, including the return of all cash invested, a declaratory judgment that the promissory note executed by the plaintiff, is null and void, or damages as a rescissional equivalent. Further, plaintiff seeks a declaratory judgment that defendants are jointly and severally liable to the plaintiff for any damages he has sustained. In addition, plaintiff seeks an

award in the amount of threefold the damages suffered by him, in accordance with the provisions of Section 1964 of RICO, exemplary damages, attorneys' fees and costs.

JURISDICTION AND VENUE

18. The plaintiff's claims arise under an act of Congress regulating commerce. The jurisdiction of this court is therefore invoked pursuant to 18 U.S.C. § 1964(b) and (c), the Racketeer Influenced and Corrupt Organizations Act. The venue of this proceeding is in this Court pursuant to 28 U.S.C. § 1391(b) and (d).

FIRST CLAIM FOR RELIEF

(RICO Treble Damage Claim)

19. This is an action against defendants Blair, Bilton, and Van Cauwenberghe for treble damages pursuant to RICO, 18 U.S.C. § 1964(b) and (c).

20. Plaintiff realleges and incorporates by reference paragraphs 1 through 18, inclusive, of this Complaint as if set forth verbatim herein.

21. Beginning in or about July 1979, defendants Blair, Bilton, and Van Cauwenberghe, doing business as Three B Investment Associates, Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V. being employed by and associated with enterprises engaged in and the activities of which affected interstate and foreign commerce, willfully and knowingly did conduct and participate, directly and indirectly, in the conduct of the affairs of such enterprises through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

22. The enterprises whose affairs were conducted through a pattern of racketeering activity was, at all times material hereto, an association in fact made up of corporations, individuals and legal entities as defined in 18 U.S.C. § 1961(4). Said enterprises were made up of defendants Alan H. Blair, Gerald L. Bilton, and Wil-

fried Van Cauwenberghe, doing business as Three B Investment Associates, Inc., Hexagonal Valley, N.V., Sante N.V., and Swiebel, N.V.

23. The pattern of racketeering activity engaged in by the defendants, as defined in 18 U.S.C. §§ 1961(1)(B) and (5), consisted of the following:

a. Acts of wire fraud in violation of 18 U.S.C. § 1343, and those specific acts of wire fraud alleged in Count 2 of the Indictment in *United States v. Blair, et al.*, Case No. 84-963 AAH (C.D. Cal. 1984), the allegations of which are hereby incorporated by reference as though fully set forth herein;

b. Acts of the interstate transportation of stolen property in violation of 18 U.S.C. § 2314, and those specific acts of interstate transportation of stolen property alleged in Count 1 of the aforementioned Indictment, the allegations of which are hereby incorporated by reference as though fully set forth herein.

24. On October 11, 1984, a Federal Grand Jury for the Central District of California returned an Indictment No. 84-963 against defendants Alan H. Blair, Gerald L. Bilton, and Wilfred Van Cauwenberghe. A copy of that Indictment is attached hereto as Exhibit B. The allegations of that Indictment at [*sic*] hereby incorporated by reference as though set forth in full herein.

25. By reason of defendants' violation of 18 U.S.C. § 1962(c), as described above, plaintiff was injured in its business and property in the amount to be proven at trial, which is not less than $1,800,000 together with interest thereon at the full legal rate.

SECOND CLAIM FOR RELIEF

(Common Law Fraud)

26. The allegations against all defendants set forth in this Second Claim for Relief arise under the laws of the

State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

27. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 18, inclusive, of this complaint as if set forth verbatim herein.

28. During 1979, defendants, individually and in concert, and also each participating with or aiding and abetting and conspiring with the other, induced Biard to grant to them a $1 million loan by willfully or recklessly making misrepresentations of material facts and by omitting to disclose material facts necessary to prevent the statements made from being deceptive and misleading, including, but not limited to, the following material misrepresentations and omissions set forth below:

(a) It was represented that Biard's funds would be used by defendant Three B Investment Associates for the conversion of Concorde Bridge into condominium units. In fact, as defendants well knew but concealed from Biard, they never intended to and never did arrange or cause the conversion of Concorde Bridge into condominium units, but misappropriated and diverted Biard's money for other purposes.

(b) It was represented that defendant Three B Investment Associates had completed negotiations and had purchased Concorde Bridge. In fact, as defendants well knew but concealed from Biard, negotiations for the purchase of the property had not been completed and defendant Three B Investment Associates had not purchased Concorde Bridge.

(c) It was represented that defendant Blair had personally invested and had caused defendant Three B Investment Associates to invest substantial amounts in the purchase of Concorde Bridge. In fact, as defendants well knew but concealed from

Biard, neither defendant Blair nor defendant Three B Investment Associates had actually substantially invested in the purchase of Concorde Bridge.

(d) It was represented that Biard's funds would be secured by virtue of a mortgage on the Concorde Bridge realty. In fact, as defendants well knew but concealed from Biard, his funds were not secured by a mortgage on the Concorde Bridge property or in any other manner, but were deposited, allocated and disbursed according to the personal whims and designs of defendants and misappropriated and diverted for their benefit, and for the benefit of defendant Three B Investment Associates.

29. In order to deceive and lull Biard into believing that his funds had been invested as represented, to prevent him from complaining to governmental agencies, and to further induce him to invest in other investment programs, defendants caused yearly payments to be made to Biard.

30. Biard reasonably relied upon information communicated to him by defendants and each of them, as hereinabove represented.

31. Defendants' conduct, as aforesaid, constitutes fraud and deceit, by reason of which Plaintiff has suffered damages. As a result, Biard has been damaged by defendants, and each of them, in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

32. In conducting themselves, as described above, defendants, and each of them, have acted willfully, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendants, and each of them, in the sum of $5,000,000.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

33. The allegations against all defendants set forth in this Third Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

34. Plaintiff realleges and incorporates by reference paragraphs 1 through 18, inclusive, of this Complaint as if set forth verbatim herein.

35. On or about November 11, 1979, Biard entered into a written agreement with defendants, and each of them, through defendant Three B Investment Associates, whereby Biard agreed to loan of $1 million to defendant Three B Investment Associates. A true and correct copy of the Loan Agreement is attached hereto as Exhibit A and incorporated herein as though fully set forth.

36. In pertinent part, the terms and conditions of the Loan Agreement provided that in exchange for Biard's loan of $1 million, defendant Three B Investment Associates promised to repay the loan over a three year period at 20 per cent per annum, including $165,000 the first year, $235,000 the second year, and $600,000 the third year. The promise to pay was to be secured by defendant Three B Investment Associates' ownership interest in Concorde Bridge.

37. Defendants, and each of them, continue to fail and refuse without just cause, to deliver to Biard the final payment due and owing under the Loan Agreement.

38. Biard has duly performed each and every condition, covenant and promise under the Loan Agreement to be performed on his part, except to the extent that he was prevented or excused from such performance, or said condition, covenant and promise has occurred or been waived.

39. Biard has demanded that the defendants, and each of them, deliver the money they borrowed pursuant to the Loan Agreement, but defendants, and each of them, have failed and refused, and continue to fail and refuse without just cause, to repay said money.

40. As a direct and proximate result of defendants' failure and refusal as alleged herein, Biard has been damaged by defendants, and each of them, in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

FOURTH CLAIM FOR RELIEF

(Unjust Enrichment)

41. The allegations against all defendants set forth in this Fourth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

42. Plaintiff realleges and incorporates by reference paragraphs 1 through 18, and 35 through 39, inclusive, of this Complaint as if fully set forth herein.

43. Within four years preceding the commencement of this action, defendants, and each of them, came into possesion of money belonging to Biard. The total value of said money was in excess of $600,000, which was justly due to Biard but which has never been paid by defendants, and each of them.

44. Defendants, and each of them, continued failure to pay such money has operated to the unjust enrichment of defendants, and each of them, so that defendants, and each of them, are under a duty to pay to Biard the total value of such money in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

FIFTH CLAIM FOR RELIEF

(Breach of the Covenant of Good Faith and Fair Dealing)

45. The allegations against all defendants set forth in this Fifth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

46. Plaintiff realleges and incorporates by reference paragraphs 1 through 18, and paragraphs 35 through 39, inclusive of this Complaint as if fully set forth verbatim herein.

47. Every agreement contains an implied covenant that both parties thereto will act in good faith and deal fairly with the other party to the agreement. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by refusing to honor and perform their obligations under the Loan Agreement on pretextural [*sic*] and fraudulent grounds.

48. An implied covenant in the Loan Agreement was that defendants, and each of them, would make every reasonable effort to perform each of their obligations under the Loan Agreement. Defendants, and each of them, breached these covenants by refusing to make any effort to repay the loan in its entirety. Defendants, and each of them, knew the significant and substantial damages which Biard would suffer if the loan was not repaid in a timely manner.

49. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by refusing to honor and perform their obligations under the Loan Agreement. As a direct and proximate result of defendants' breach of the implied covenant of good faith and fair dealing, Biard has been damaged in a amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

50. In doing each of the acts alleged herein, defendants, and each of them, acted willfully, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendant, and each of them, in the sum of $5,000,000.

SIXTH CLAIM FOR RELIEF

(Denial of the Existence of a Contract)

51. The allegations against defendants Blair and Van Cauwenberghe set forth in this Sixth Claim for Relief arise under the laws of the State of California and are so closely related to those allegations contained in the First Claim for Relief hereof as to invoke this Court's pendent jurisdiction.

52. Plaintiff realleges and incorporates by reference paragraphs 1 through 18, and paragraphs 35 through 39, inclusive, of this Complaint as if fully set forth verbatim herein.

53. Defendants Blair and Van Cauwenberghe now contend that they were not members or partners of defendant Three B Investment Associates and thus were not parties to the Loan Agreement. This position has been taken and asserted by defendants Blair and Van Cauwenberghe in bad faith and without probable cause, and a result, defendants Blair and Van Cauwenberghe are, therefore, subject to liability in tort.

54. The tortious denial by defendants Blair and Van Cauwenberghe of their obligations under the Loan Agreement has directly and proximately caused Biard to be damaged in an amount to be proven at trial, which is not less than $600,000, together with interest thereon at the full legal rate.

55. In denying the existence of their obligations under the Loan Agreement, defendants Blair and Van Cauwenberghe have acted willfully, maliciously, and in wanton disregard of Biard's rights. Therefore, Biard seeks exemplary and punitive damages from defendants Blair and Van Cauwenberghe, and each of them, in the sum of $5,000,000.

WHEREFORE, Biard prays for judgment against the defendants, and each of them, as follows:

A. On the First Claim for Relief:

1. For treble damages according to proof at trial in an amount not less than $1,800,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

B. On the Second Claim for Relief:

1. For rescission of the Loan Agreement, including a return to plaintiff of all cash invested, and a declaratory judgment that the promissory note, mortgage, and all other documents executed by plaintiff in connection with the loan to defendant Three B Investment Associates, are null and void, or for damages as a rescissional equivalent;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

C. On the Third Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

D. On the Fourth Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For reasonable attorneys' fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

E. On the Fifth Claim for Relief:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

F. On the Sixth Cause of Action:

1. For damages according to proof at trial in an amount not less than $600,000, with interest thereon at the full legal rate;

2. For exemplary and punitive damages in the sum of $5,000,000 to punish defendants, and each of them, for their malicious and wanton acts;

3. For reasonable attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby request trial by jury of all issues permitted by law to be submitted to the jury.

DATED: This 19th day of November, 1985.

BRYAN, CAVE, MCPHEETERS
& MCROBERTS
ALBERT GOLBERT
ANNIE K. BAKER

By /s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
February 1984 Grand Jury

UNITED STATES OF AMERICA,
Plaintiff,
v.

ALAN H. BLAIR, GERALD L. BILTON, and
WIELFRIED VAN CAUWENBERGHE,
Defendants.

No. CR ———

INDICTMENT

[18 U.S.C. § 2314: Interstate Transportation of a Victim of Fraud; 18 U.S.C. § 1343: Wire Fraud; 18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 2: Aiding and Abetting; Causing an Act to Be Done]

The Grand Jury charges:

COUNT ONE

(18 U.S.C. §§ 2314, and 2)

1. At all times material herein, Concorde Bridge Townhouses (hereinafter Concorde Bridge) was an apartment complex owned by EES Kabid, a Texas limited partnership and by the Prudential Insurance Company of America. The Concorde Bridge complex is located near Kansas City in Overland Park, Kansas.

2. At all times material herein, Three B Investment Associates was an unincorporated and unregistered entity formed ostensibly for the purchase of Concorde Bridge and the members of which included defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE.

3. At all times material herein, Fides Societe Fiduciare, Geneva, Switzerland, was a trust company and a subsidiary of Credit Suisse, a banking institution with headquarters in Switzerland.

4. At all times material herein, Hexagonal Valley, N.V. and Swiebel, N.V., were Netherlands Antilles corporations controlled by defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE.

5. From on or about July 1979, up to and including on or about March 31, 1982, the exact dates being unknown to the Grand Jury, within the Central District of California and elsewhere, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE, together with others known and unknown to the Grand Jury, devised and intended to devise and employ a scheme and artifice to defraud Roger Biard and the Vandenstock family (hereinafter victim investors) of approximately $3.6 million by means of false and fraudulent pretenses, representations and promises, which defendants well knew would be and were false when made.

6. It was a part of said scheme and artifice to defraud that in order to obtain the aforementioned $3.6 million from the victim investors the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did form Three B Investment Associates to engage in negotiations and to enter into a contract of sale with the actual owners of Concorde Bridge, for the purpose of creating the appearance that the defendants owned Concorde Bridge.

7. It was a further part of said scheme and artifice to defraud that defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did use the appearance of ownership described in paragraph 6 to obtain monies from the victim investors.

8. It was a further part of said scheme and artifice to defraud that defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did make and caused to be made false and fraudulent pretenses and representations, which included the following:

a) The defendants falsely represented to Roger Biard that they owned Concorde Bridge Townhouses through a partnership they identified as Three B Investment Associates, whereas in truth and in fact they merely were negotiating with the owners of Concorde Bridge for a contract of sale;

b) the defendants falsely represented to Roger Biard that Three B Investment Associates had used all of its funds for the purchase of Concorde Bridge and therefore needed to obtain a loan of $1.5 million to fund the conversion of Concorde Bridge into condominium units, whereas in truth and in fact Three B Investment Associates had neither purchased nor used any funds to purchase Concorde Bridge and was not engaged in a condominium conversion of Concorde Bridge;

c) the defendants provided to Roger Biard a note for $1 million and a mortgage securing that note, which documents the defendants falsely represented as conveying to Biard a security interest in Concorde Bridge, whereas in truth and in fact the defendants had no ownership or other conveyable interest in Concorde Bridge;

d) the defendants, in order to lull Roger Biard into a false sense of security in the period following Biard's $1 million loan to the defendants, falsely represented to Biard that the conversion of Concorde Bridge into condominium units was progressing well and that several units had been sold, whereas in truth and in fact the defendants were never the owners of Concorde Bridge, there was never a condominium conversion of Concorde

Bridge and there were never any sales of Concorde Bridge units;

e) the defendants falsely represented to the Vandenstock family that the defendants, through Three B Investment Associates, owned Concorde Bridge, whereas in truth and in fact the defendants had no ownership interest in Concorde Bridge but merely held an expired contract of sale for that property;

f) the defendants falsely represented in documents provided to the Vandenstock family that the defendants were conveying ownership of Concorde Bridge to the Vandenstock family, whereas in truth and in fact the defendants had no ownership interest in Concorde Bridge.

9. It was a further part of said scheme and artifice to defraud that in order to conceal their scheme defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did use foreign shell companies, including Hexagonal Valley, N.V., and Swiebel, N.V., and foreign bank and trust accounts in Switzerland and elsewhere to disguise and conceal their scheme to defraud and their receipt of money obtained by the fraudulent scheme.

10. It was a further part of said scheme and artifice to defraud that for the purpose of disbursing the scheme proceeds among themselves the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did cause the $3.6 million fraudently obtained from Roger Biard and the Vandenstock family to be deposited and secretly disbursed using accounts maintained for the defendants at Fides Societe Fiduciare in Geneva, Switzerland.

11. On or about October 20, 1979, within the Central District of California and elsewhere, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE, having devised and intended to devise the aforesaid scheme and artifice to defraud,

and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, did cause Roger Biard to be transported in interstate commerce from Atlanta, Georgia, to Los Angeles, California, in the execution of the aforesaid scheme and artifice to defraud Roger Biard of $1 million.

COUNT TWO

(18 U.S.C. §§ 1343, and 2)

1. Paragraphs 1 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

2. On or about December 6, 1979, within the Central District of California, the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE, for the purpose of executing the aforesaid scheme and artifice, did cause to be transmitted in interstate commerce, signs, signals, and sounds by means of wire communications, that is, a telex between Geneva, Switzerland, and Los Angeles, California, directing the transfer of $1 million fraudulently obtained from Roger Biard to an account in the name of Hexagonal Valley, N.V., at Manufacturers Bank, Los Angeles, California.

COUNT THREE

(18 U.S.C. §§ 2314, and 2)

1. Paragraphs 1 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

2. On or about October 14, 1980, within the Central District of California and elsewhere, the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE, having devised and intended to devise the aforesaid scheme and artifice to defraud, and for obtaining money and property by means

of false and fraudulent pretenses, representations and promises, did cause Roger Vandenstock to be transported in interstate commerce from Brussels, Belgium, by way of New York City, New York, to Los Angeles, California, in the execution of the aforesaid scheme and artifice to defraud the Vandenstock family of money totalling approximately $2.6 million.

COUNT FOUR

(18 U.S.C. §§ 2314, and 2)

1. Paragraphs 1 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

2. On or about November 9, 1980, within the Central District of California and elsewhere, the defendants ALAN H. BLAIR, GERALD L. BILTON AND WIELFRIED VAN CAUWENBERGHE having devised and intended to devise the aforesaid scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, did cause Roger Vandenstock to be transported in interstate commerce from Brussels, Belgium, by way of Chicago, Illinois, to Los Angeles, California, in the execution of the aforesaid scheme and artifice to defraud the Vandenstock family of money totalling approximately $2.6 million.

COUNT FIVE

(18 U.S.C. §§ 1343, and 2)

1. Paragraphs 1 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

2. On or about January 6, 1981, within the Central District of California and elsewhere, the defendants ALAN H. BLAIR, GERALD L. BILTON AND WIELFRIED VAN CAUWENBERGHE, for the purpose of executing the aforesaid scheme and artifice, did cause to

be transmitted in interstate commerce, signs, signals, and sounds by means of wire communications, that is, a telex between Geneva, Switzerland and Los Angeles, California, directing the transfer of $75,000 of funds fraudulently obtained from the Vandenstock family to an account in the name of Dietary Supplement Corporation at Union Bank, Los Angeles, California, which account was under the control of the defendants.

COUNT SIX

(18 U.S.C. §§ 1343 and 2)

1. Paragraphs 1 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

2. On or about July 23, 1981, within the Central District of California and elsewhere, the defendants ALAN H. BLAIR, GERALD L. BILTON AND WIELFRIED VAN CAUWENBERGHE, for the purpose of executing the aforesaid scheme and artifice, did cause to be transmitted in interstate commerce, signs, signals, and sounds by means of wire communications, that is, a telex between Geneva, Switzerland and Los Angeles, California, directing the transfer of $150,000 of funds fraudulently obtained from the Vandenstock family to an account in the name of the wife of defendant ALAN H. BLAIR at Great American Bank, Los Angeles, California.

COUNT SEVEN

(18 U.S.C. § 371)

1. Paragraphs 1 through 4 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein.

The Conspiracy

2. From in or about June 1979, up to and including March 31, 1982, within the Central District of California and elsewhere, defendants ALAN H. BLAIR, GERALD

L. BILTON AND WIELFRIED VAN CAUWENBERGHE, did unlawfully, knowingly, and willfully combine, conspire, confederate, and agree together, with each other, and with other persons known and unknown to the Grand Jury, to commit the following offenses against the United States:

a) To cause to be transported in interstate commerce a person in the execution of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more, in violation of 18 U.S.C. Section 2314; and

b) to transmit and cause to be transmitted by means of wire communications in interstate and foreign commerce, writings, signs, signals, and sounds for the purpose of executing a scheme and artifice to defraud and to obtain money, in violation of 18 U.S.C., Section 1343.

The Conspiracy Objects and Means

3. Paragraphs 6 through 10 of Count One of this Indictment are hereby incorporated by reference as through fully realleged herein as constituting the objects of the conspiracy and the manner and means by which defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE would and did carry out the conspiracy.

Overt Acts

4. In furtherance of the conspiracy and to effect its objects, the defendants committed and caused to be committed the following acts, among others, in the Central District of California and elsewhere:

a) In or about June 1979, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE agreed to form Three B Investment Associates for the purpose of engaging in negotiations for a contract of sale with the owners of Concorde Bridge.

b) On or about July 5, 1979, defendants ALAN H. BLAIR and GERALD L. BILTON caused their attorneys in Kansas City to submit a draft contract of sale to the owners of Concorde Bridge.

c) On or about July 17, 1979, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE met in Kansas City and agreed to continue negotiations with the owners of Concorde Bridge for a contract of sale.

d) In or about September 1979, defendants ALAN H. BLAIR and GERALD L. BILTON requested their attorneys in Kansas City to forward to the defendants in Los Angeles, California, copies of draft promissory note and Kansas mortgage forms.

e) In or about September or October 1979, defendant WIELFRIED VAN CAUWENBERGHE met with Roger Biard in Brussels, Belgium, for the purpose of inducing Biard to travel to Los Angeles, California, to discuss investment in the Concorde Bridge project.

f) In or about October 1979, defendants ALAN H. BLAIR and WIELFRIED VAN CAUWENBERGHE met in Los Angeles with Roger Biard and induced Biard to provide a $1 million loan to Three B Investment Associates for an alleged condominium conversion of Concorde Bridge by stating that the defendants, through Three B Investment Associates, owned Concorde Bridge.

g) In or about October 1979, defendant GERALD L. BILTON executed as "Managing Partner" of Three B Investment Associates a note payable to Roger Biard for $1 million and a mortgage securing said note.

h) On or about October 28, 1979, defendant GERALD L. BILTON induced his attorney to notarize the mortgage described in the paragraph (g).

i) In or about October 1979, defendant WIELFRIED VAN CAUWENBERGHE provided to Roger Biard the note and mortgage described in paragraphs (g) and (h).

j) In or about October 1979, defendant WIELFRIED VAN CAUWENBERGHE obtained from Roger Biard a check in the amount of $1 million as a loan to Three B Investment Associates for the condominium conversion of Concorde Bridge.

k) On or about November 13, 1979, defendant WIELFRIED VAN CAUWENBERGHE deposited at the offices of Fides Societe Fiduciare in Geneva, Switzerland, the check described in paragraph (j) for credit to an account controlled by the defendants.

1) On or about December 6, 1979, defendant ALAN H. BLAIR instructed Fides Societe Fiduciare to transfer the $1 million described in the preceding two paragraphs to a bank account controlled by the defendants at Manufacturers Bank in Los Angeles, California.

m) In or about July 1979 and May 1980, defendants ALAN H. BLAIR and WIELFRIED VAN CAUWENBERGHE in meetings in Brussels, Belgium, with representatives of the Vandenstock family, stated that the defendants, through Three B Investment Associates, owned Concorde Bridge and suggested that the Vandenstock family purchase that property.

n) In or about October 1980, after the expiration of the contract of sale between Three B Investment Associates and the owners of Concorde Bridge, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE met in Los Angeles, California, with Roger Vandenstock to induce the Vandenstock family to buy Concorde Bridge from the defendants for $12.5 million.

o) In or about November 1980, defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED VAN CAUWENBERGHE met in Los Angeles, California, with Roger Vandenstock for further negotiations concerning the defendants' proposed sale of Concorde Bridge to the Vandenstock family.

p) In or about December 1980, defendants ALAN H. BLAIR and WIELFRIED VAN CAUWENBERGHE met with representatives of the Vandenstock family at the offices of Fides Societe Fiduciare in Geneva, Switzerland, to execute the sale of Concorde Bridge by the defendants to the Vandenstock family.

q) In or about December 1980, defendant GERALD L. BILTON induced his attorney to prepare and forward to the defendants in Los Angeles, California, a document that purported to transfer the rights of Three B Investment Associates in its contract with the owners of Concorde Bridge, which contract had expired on or about August 4, 1980.

r) From on or about December 23, 1980, to and including on or about March 3, 1982, the defendants caused the Vandenstock family to transfer funds totaling more than $2.6 million to accounts controlled by the defendants at Fides Societe Fiduciare, as follows:

1)	December 23, 1980	$1,000,000
2)	July 27, 1981	$ 200,000
3)	October 22, 1981	$ 850,000
4)	October 26, 1981	$ 100,000
5)	November 9, 1981	$ 350,000
6)	March 3, 1982	$ 100,427

A TRUE BILL

_____

Foreperson

ROBERT C. BONNER
United States Attorney

/s/ Robert L. Brosio
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

VERIFICATION

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I the undersigned, declare (check and complete applicable paragraphs):

☒ I am a party to this action. I have read the foregoing FIRST AMENDED COMPLAINT and know its contents. The matters stated in it are true of my own knowledge, except as to those matters which are stated on information and belief and as to those matters. I believe them to be true.

Executed on November 19, 1985

/s/ Roger Biard
ROGER BIARD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Jan. 7, 1986]

**ORDER TO SHOW CAUSE RE:
LACK OF DIVERSITY CITIZENSHIP**

The complaint in this action has come before the Court and the Court has reviewed it. The Court finds that plaintiff and at least one defendant are citizens or subjects of a foreign state for purposes of 28 U.S.C. § 1332 (a). Federal diversity jurisdiction does not extend to controversies among aliens. *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983); *Trans World Hosp. Supplies Ltd. v. Hospital Corp. of America*, 542 F.Supp. 869 (M.D. Tenn. 1982); *R.W. Sawant & Co. v. Ben Kozloff, Inc.*, 507 F.Supp. 614 (N.D. Ill. 1980); *Trinanes v. Shulte*, 311 F.Supp. 812 (S.D.N.Y. 1970); *Hercules Inc. v. Dynamic Export Corp.*, 71 F.R.D. 101 (S.D.NY 1976). Because of this deficiency, it appears that the Court may lack jurisdiction over this matter under 28 US.C. § 1332. Therefore,

IT IS HEREBY ORDERED THAT:

1. Plaintiff shall show cause and file a statement of points and authorities as to why this action should not be dismissed for lack of diversity jurisdiction. Such statement of points and authorities shall be filed on or before January 27, 1986. In the event that plaintiff agrees with the Court that jurisdiction has not properly been pleaded

in this case, plaintiff may file an amended complaint containing sufficient and proper allegations on or before January 27, 1986. Failure to file either an amended complaint or statement of points and authorities on time shall, without further proceedings, result in issuance of an order dismissing this action.

2. In the event that plaintiff files a statement of points and authorities in response to this Order, and does not file an amended complaint with the proper jurisdictional allegations, defendants may file statements of their positions and points and authorities on the issues raised herein on or before February 3, 1986. The matter shall be placed on the Court's calendar for hearing on Monday, February 10, 1986 at 10:00 a.m. in Courtroom 12. At the Court's discretion, however, the matter may be resolved without oral argument pursuant to Fed. R. Civ. P. 78 and Local Rule 7.11.

3. In the event that plaintiff files an amended complaint with the proper jurisdictional allegations in response to this Order, and does not file a statement of points and authorities, defendants shall plead in response to the amended complaint within 20 days after service of the amended pleading under Fed. R. Civ. P. 15(a).

4. The Clerk shall serve copies of this Order to Show Cause by United States mail on counsel for plaintiff who shall immediately thereafter arrange to serve copies of this Order on all defendants who have been served.

DATE: January 6, 1986.

/s/ Pamela Ann Rymer
PAMELA ANN RYMER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Feb. 6, 1986]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR ADDITIONAL WRIT OF ATTACHMENT AND TEMPORARY PROTECTIVE ORDER; AND DECLARATION OF PERCY ANDERSON IN SUPPORT THEREOF

Date: February 6, 1986
Time: 9:30 a.m.
Place: Courtroom G 19

Plaintiff, Roger Biard, hereby applies *ex parte* for an application for issuance of an additional Writ of Attachment against the property, as described herein, of defendant Wilfried Van Cauwenberghe, which is presently in the joint possession of the attorneys for defendant Wilfried Van Cauwenberghe and attorneys for the United States, and for a Temporary Protective Order enjoining the Clerk of the United States District Court from transferring any funds in excess of the court ordered restitution realized from the sale of the Abamar and Batimar stock certificate without further order of this court. This application is based on the attached Memorandum of Points and Authorities, the attached declaration, the complaint on file herein, and such other

argument and evidence that may be presented at any hearing on the application.

* * * *

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

Plaintiff, Roger Biard, has filed this suit to recover damages for, *inter alia*, fraud and breach of contract by defendant Wilfried Van Cauwenberghe and others. Defendants Van Cauwenberghe, Gerald Bilton, and Alan H. Blair were also charged in a federal criminal indictment with wire fraud, interstate transportation of stolen property, and conspiracy in violation of 18 U.S.C. §§ 3143, 2314, and 371. *See United States v. Blair, et al.*, CR 84-983 AAH. A true and correct copy of the indictment is attached hereto as Exhibit A. They are alleged to have obtained by fraud over $3 million from two Belgium nationals, including $1 million from plaintiff Roger Biard. On January 22, 1986, following a jury verdict of guilty on all counts, defendant Van Cauwenberghe was sentenced by the Honorable A. Andrew Hauk to a term of imprisonment of one (1) year and a one (1) day, the defendant to become eligible for parole pursuant to Title 18, United States Code, Section 4205(a) upon serving one-third of the sentence of imprisonment. The defendant was also ordered to pay a fine to the United States in the sum of $10,000 on count one of the indictment. In addition, the defendant was placed on probation for five years on count two provided he make restitution in the total sum of $492,875.15 of which $34,501.26 is to be paid to Roger Biard and $458,373.89 is to be paid to Roger Vandenstock, another victim of the defendant's criminal enterprise. Defendant Van Cauwenberghe is currently on probation having been given credit for 373 days of time served. A true and correct copy of the Judgment and Commitment Order is attached hereto as Exhibit B.

When Van Cauwenberghe, a Belgium national, was arrested in Geneva, Switzerland, various of his assets were seized pursuant to Article XII of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. Among the assets seized and forwarded to this country were two stock certificates representing Van Cauwenberghe's shares of stock in two Panamanian companies, Abamar and Batimar. The stock is valued at approximately $700,000.

On November 12, 1985, upon plaintiff's *ex parte* application, this court issued a Writ of Attachment attaching the two stock certificates. On January 23, 1986, the Honorable A. Andrew Hauk issued an Order transferring the stock certificates to the joint custody of the attorneys for defendant Van Cauwenberghe and the attorneys for the government in order that the certificates might be sold to effectuate his restitution order. A true and correct copy of the Court's Order is attached hereto as Exhibit C. It is believed that the stock certificates have a value in excess of the restitution ordered by the court.

Pursuant to §§ 492.010 and 485.210 of the California Code of Civil Procedure, plaintiff seeks an *ex parte* order for issuance of an additional writ of attachment (non-resident) or, in the alternative, a temporary protective order for any proceeds of the stock transaction in excess of the restitution ordered by the court. The defendants have indicated that they are entitled to and intend to seize any funds in excess of the court's restitution order. It is for this reason that the plaintiff seeks the assistance of this court to attach any proceeds in excess of the restitution ordered by the court in order to satisfy any judgment that be awarded in this action.

* * * *

Prejudgment attachment is particularly appropriate in this case—the excess proceeds realized from the sale of the Abamar and Batimar stock certificates will be within

the territorial jurisdiction of this court, the claim is for money loaned, the amount of money at stake is not, and could hardly be in dispute, the security is valueless inasmuch as Three B Investment Associates never owned Concorde Bridge Townhouses, and Van Cauwenberghe's conduct was clearly in the context of a commercial transaction. Moreover, given Van Cauwenberghe's conviction, there is a strong probability that plaintiff wlil prevail on the merits.

Plaintiff is entitled to an additional writ of prejudgment attachment in order to assure that there are funds available to satisfy any judgment that may be rendered by this court. Defendant Van Cauwenberghe and his associates have blatantly ignored their obligations under the promissory note and have refused to repay their loan even though plaintiff is entitled to payment. Since Van Cauwenberghe and his associates never had any intention of honoring their obligations under the promissory note, plaintiff has been forced to seek the court's assistance in obtaining the return of his funds. There can be no clearer example of a commercial transaction in which prejudgment attachment is both appropriate and necessary. As provided by Section 488.450 of the California Code of Civil Procedure, the excess proceeds realized from the sale of Van Cauwenberghe's stock certificates may be levied upon by the levying officer by serving the Clerk of the Court with a copy of the writ and notice of attachment.

For all of the foregoing reasons, plaintiff is entitled to an additional *ex parte* writ of attachment attaching the excess proceeds realized from the sale of the Abamar and Batimar stock certificates.

* * * *

For all of the foregoing reasons, plaintiff respectfully requests that this court issue an *ex parte* writ of attachment or, in the alternative, a temporary protective order.

Respectfully submitted,

BRYAN, CAVE, MCPHEETERS
& MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

By /s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

DECLARATION OF PERCY ANDERSON

I, Percy Anderson, declare as follows:

1. I am an attorney duly licensed to practice before all courts of the State of California. I am associated with the law firm of Bryan, Cave, McPheeters & McRoberts, attorneys of record for plaintiff Roger Biard in the action entitled *Biard v. Van Cauwenberghe, et al.*, CV 85-7378 PAR (JRx).

2. The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

3. When Van Cauwenberghe, a Belgium national, was arrested in Geneva, Switzerland, various of his assets were seized pursuant to Article XII of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. Among the assets seized and forwarded to this country were two stock certificates representing Van Cauwenberghe's shares of stock in two Panamanian companies, Abamar and Batimar. According to assertions by defendant Van Cauwenberghe and his attorneys, the Abamar and Batimar stock certificates are valued at approximately $700,000.

4. On November 12, 1986, this court issued a writ of attachment for two stock certificates belonging to defendant Wilfried Van Cauwenberghe. Shortly, thereafter, plaintiff filed a bond securing the writ of attachment.

5. On January 22, 1986, following a jury verdict of guilty on all counts, defendant Van Cauwenberghe was sentenced by the Honorable A. Andrew Hauk to a term of imprisonment of one (1) year and a one (1) day, the defendant to become eligible for parole pursuant to Title 18, United States Code, Section 4205(a) upon serving one-third of the sentence of imprisonment. The defendant was also ordered to pay a fine to the United States in the sum of $10,000 on count one of the indictment. In addi-

tion, the defendant was placed probation for five years on count two provided he make restitution in the total sum of $492,875.15 of which $34,501.26 is to be paid to plaintiff and $458,373.89 is to paid to Roger Vandenstock, another victim of the defendant's criminal enterprise.

6. On January 23, 1986, the Honorable A. Andrew Hauk issued an Order transferring the stock certificates to the joint custody of the attorneys for defendant Van Cauwenberghe and the attorneys for the government in order that the certificates might be sold to effectuate his restitution order.

7. This application is sought to prevent the dissipation of the proceeds of any sale of the stock certificates. I am informed and believe that no other assets of any of the defendants is available within the jurisdiction of this court.

8. I am informed and believe that the stock certificates are currently in the possession of the attorneys for the Fraud Section of the United States Department of Justice and attorneys for Van Cauwenberghe. I am informed and believe that such stock is described as:

—registered certificate No. 19 from Abamar Corporation, Panama, representing 6.293% of its capital.

—registered certificate No. 15 from the Batimar Corporation, Panama, representing 19.659% of its capital.

9. Plaintiff has no security interest in any property of any defendant to secure any claims in this action or any portion of said claims. The security interest which was purportedly given to plaintiff is of no value since the defendants did not own the property.

10. The additional attachment is sought for no purpose other than to preserve these assets for satisfaction of claims set forth in the verified complaint.

11. I am informed and believe that the property sought to be attached is property subject to attachment under California law and not exempt from attachment under California law.

12. I am informed and believe that plaintiff's claims have not been discharged or stayed in any proceeding under the National Bankruptcy Act.

NOTICE

13. On Tuesday, February 4, 1986, I placed a telephone call to John Kester, Esq., one of the attorneys representing Wilfried Van Cauwenberghe in the criminal proceedings entitled *United States v. Blair, et al.*, CR 84-963 AAH. I advised Mr. Kester of my intention to seek an additional writ of attachment for any excess funds realized from the sale of the Abamar and Batimar stock certificates. Mr. Kester told me that he was not authorized to make an appearance in any civil proceedings and that he did not intend to be present. I asked him he would notify Wilfried Van Cauwenberghe of our intention to seek an additional writ of attachment and he told me that he rarely speaks with his client, but that he would attempt to do so.

14. On Tuesday, February 5, 1986, I left a message for John Kester to advise Mr. Van Cauwenberghe that I would be appearing before United States Magistrate Joseph Reichmann on Thursday, February 6, 1986, at 9:30 a.m., in courtroom G on the Main Street level, of the United States Courthouse, Los Angeles, California, seeking an additional writ of attachment for any excess funds realized from the sale of the Abamar and Batimar stock certificates.

15. On Wednesday, February 5, 1986, I left a written message for Mr. Van Cauwenberghe with the United States Probation Officer assigned to him. The message stated that I would be appearing before United States

Magistrate Joseph Reichmann on Thursday, February 6, 1986, at 9:30 a.m., in courtroom G on the Main Street level, of the United States Courthouse, Los Angeles, California, seeking an additional writ of attachment for any excess funds realized from the sale of the Abamar and Batimar stock certificates. I am informed that Mr. Van Cauwenberghe was scheduled to meet his probation officer on Wednesday.

16. In conversations with the United States Probation Office I have been informed that Mr. Van Cauwenberghe intends to leave the Central District of California in the next day or so and will be residing in the Washington, D.C. area for the remainder of his probationary term.

17. Plaintiff Roger Biard is a resident of Brussels, Belgium and is currently unavailable to verify the application for the additional writ of attachment. I have reviewed the contents of the application with him and been authorized to seek an additional writ of attachment by him. I have executed the application for an additional writ of attachment pursuant to California Code of Civil Procedure § 446.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 5th day of February, 1986.

/s/ Percy Anderson
PERCY ANDERSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Feb. 6, 1986]

EX PARTE ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT (NONRESIDENT)

1. The application and supporting affidavit of plaintiff (name): ROGER BIARD for an ex parte

   ☑ order for issuance of a writ of attachment has been considered by the court.

2. THE COURT FINDS

   a. ☑ Defendant (*name*): WILFRIED VAN CAUWENBERGHE

      (1) ☑ is a natural person who does not reside in California.

   b. ☑ The claim upon which the application is based is one upon which an attachment may be issued.

   c. ☑ Plaintiff has established the probable validity of the claim upon which the application is based.

   d. ☑ The attachment is not sought for a purpose other than the recovery on a claim upon which the application is based.

   e. ☒ A Right to Attach Order was issued pursuant to CCP 492.030 on (*date*): NOVEMBER 12, 1985

   f. ☑ Defendant has not filed a general appearance.

g. ☒ The affidavit accompanying the application shows that the property sought to be attached is subject to attachment, pursuant to CCP 492.040.

i. ☒ An undertaking in the amount of $7,500 is required before a writ shall issue, and plaintiff ☒ has ☐ has not filed an undertaking in that amount.

ORDER

3. IT IS ORDERED

a. ☒ Plaintiff has a right to attach property of the nonresident named in item 2a in the amount of $600,000.00.

b. ☒ The clerk shall issue a writ of attachment ☒ forthwith ☐ upon the filing of an undertaking in the amount of $600,000 against the following property of defendant (*describe property and identify statute authorizing method of levy*): Cash or cash equivalents realized from the sale of the Abamar and Batimar stock certificates pursuant to the order of United States District Court Judge A. Andrew Hauk, dated January 23, 1986, specifically that amount of cash or cash equivalents in excess of the court ordered restitution in *United States v. Van Cauwenberghe*, CR 84-963 AAH which will be in the possesion of the Clerk of the United States District Court for the Central District of California, § 488.450, § 488.475 and § 488.470 authorizes such an attachment.

Where required provide the following additional information:

(1) ☒ The property is in the possession, custody, or control of a nondefendant or a nondefendant has an interest in the property (*specify the name and address of the nondefendant*): cash or cash equivalent which will be in the possession of the Clerk of the United States District Court, 312 N. Spring Street, Los Angeles, CA.

NOTICE TO DEFENDANT: Failure to comply with this order may subject you to arrest and punishment for contempt of court.

e. Total number of boxes checked in item 3: 4

Date: 2-6-86

/s/ Joseph Reichmann
(*Type or Print Name*)

/s/ Joseph Reichmann
(Signature of Magistrate)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Feb. 25, 1986]

APPLICATION FOR LEAVE TO APPEAR SPECIALLY PRO HAC VICE

Pursuant to Rule 2.2.3.1 of the Rules of this Court, the undersigned respectfully applies for permission to appear specially *pro hac vice*. The undersigned states and certifies that he is a member in good standing of the bars of the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States, and is a member in good standing of all other bars of which he is a member; and further that he does not reside in California, nor is he regularly employed there nor regularly engaged in business, professional or other similar activities there. As local counsel the undersigned designates Jon W. Davidson, Esquire, of Irell & Manella, 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067, a member of the Bar of this Court. A form of order is submitted herewith.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-3069

February 25, 1986

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Lodged Feb. 25, 1986]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS; EXHIBITS

* * * *

I. SUBJECT-MATTER JURISDICTION IS LACKING

Defendant Wilfried Van Cauwenberghe has moved to dismiss the complaint herein as to him for lack of jurisdiction of the subject matter, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

* * * *

2. The Court's *sua sponte* recognition of the jurisdictional defect of the complaint was clearly correct. Plaintiff Biard is an alien. Defendant Van Cauwenberghe is an alien. Federal diversity jurisdiction, as this Court's order pointed out, does not extend to civil suits where aliens try to use the courts of this country to sue each other. As the Ninth Circuit succinctly put it in one of the cases cited in the Order to Show Cause to which plaintiff failed to respond, "Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants." *Cheng* v. *Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983). "The presence of aliens on both sides of a controversy will destroy diversity jurisdiction." *Trans World Hospital Supplies Ltd.*

v. *Hospital Corp.*, 542 F. Supp. 869, 871 (M.D. Tenn. 1982). See also, *e.g.*, *Merchants' Cotton Press & Storage Co.* v. *Insurance Co.*, 151 U.S. 368, 385-86 (1894); *Field* v. *Volkswagenwerk AG*, 626 F.2d 293 (3d Cir. 1980); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *R.W. Sawant & Co.* v. *Ben Kozloff, Inc.*, 507 F. Supp. 614 (N.D. Ill. 1981); *Hercules Inc.* v. *Dynamic Export Corp.*, 71 F.R.D. 101 (S.D.N.Y. 1976); *Trinanes* v. *Schulte*, 311 F. Supp. 812 (S.D.N.Y. 1970).

Moreover, there is no jurisdiction either under the general federal-question provision, 28 U.S.C. § 1331. The only federal basis for jurisdiction asserted in the First Amended Complaint is 18 U.S.C. § 1964(b) and (c). First Amended Complaint, ¶ 18. However, it is well settled that U.S. remedial statutes will not be construed to cover suits between foreign nationals whose private disputes over allegedly tortious conduct happen to have touched the United States. *E.g.*, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) ("The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstances of the place of injury"); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953); *Trinanes* v. *Schulte*, 311 F. Supp. 812 *supra*.[2]

II. JURISDICTION OVER THIS DEFENDANT IS LACKING

Personal jurisdiction as to defendant Van Cauwenberghe is also lacking, so that the case as to him must be dismissed pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure.

* * * *

[2] Suits between foreign nationals are also subject to dismissal under the doctrine of *forum non conveniens*. See pp. 14-17, *infra*; *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982) (dismissing fraud suit involving U.S. securities laws).

Wilfried Van Cauwenberghe was brought into this district under the authority of a treaty of extradition. It is black-letter law that he cannot be served with civil process while present as a result of that extradition.

1. *An Extradited Person Is Immune From Civil Process.*

* * * *

2. *Jurisdiction Is Barred by the Treaty with Switzerland.*

* * * *

3. *Jurisdiction Is Barred by 18 U.S.C. § 3192.*

* * * *

2. *The Suit Should Be Dismissed For Forum Non Conveniens.*

* * * *

The Supreme Court in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), emphasized that courts should dismiss actions that are more properly brought in foreign countries. It is clear that the courts are open in Brussels, and plaintiff Biard is free to bring suit there.

Moreover, the Supreme Court has emphasized that when the plaintiff is foreign, his or her choice of a U.S. court "is much less reasonable." *Piper Aircraft Co.* v. *Reyno*, *supra*, 454 U.S. at 256. "[S]uit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners." *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950). The Ninth Circuit in *Miskow* v. *Boeing Co.*, *supra*, 664 F.2d at 208, reiterated the factors listed by the Supreme Court in *Gulf Oil Co.* v. *Gilbert*, *supra*, 330 U.S. at 508-09, for the *forum non conveniens* determination. They include considerations of private convenience, access to witnesses, and U.S. public convenience as well.

To refer only to the most obvious points, both plaintiff and defendant are native speakers of French, and defendant's command of English is very limited. Ex. A at II-66; Ex. B, ¶ 5. Trial in Brussels does not require translators with the attendant expense, delay, and possibility of error.[9] The conversations of the two nearly all took place in Belgium. Ex. A at 38, 40, 41, 52, 58, 63, 64. Witnesses to those conversations are Belgian or French-speaking Swiss, all of whom are beyond the process of this Court.[10] Nuances and customs of Belgians in business dealings are best judged by other Belgians,[11] and Belgian courts are familiar with the norms of Belgian commercial practices. Expense of a proceeding in Brussels would be far less to all concerned, and would not be borne by the U.S. taxpayer. See *Miskow* v. *Boeing Co.*, *supra*, 664 F.2d at 208.

It is clear that by every one of the prescribed measures of convenience—including not the least the overburdened load of this country's federal courts—this Belgian plaintiff's complaint, if he dares to bring it,[12] should be judged

[9] Misunderstandings were frequent during testimony at the trial. See, *e.g.*, Ex. A at 28, 32, II-89, II-91. Plaintiff asked for indulgence because "I am a foreigner, your Honor," *id.* at 28, and "I don't speak English all the time," *id.* at 77, and after attempting to testify in English unsupported, called for an interpreter, *id.* at 128, which did not end the problems, *e.g.*, *id.* at 165, II-95-96.

[10] All five of the defense witnesses at the trial were residents of Brussels, and four of them were native French speakers. All three of the principal prosecution witnesses were Belgian or Swiss, and were native French speakers. Many key exhibits were in French, including prior declarations of the plaintiff. *E.g.*, *id.* at 152, 164.

[11] For example, it is doubtful that a U.S. jury could fully appreciate the significance of testimony about whether two individuals addressed each other familiarly as "*tu*" or formally as "*vous*." See *id.* at 127.

[12] There was extensive evidence at the trial that plaintiff had not filed proper tax returns in Belgium, which may explain his reluctance to use the home forum. See Exhibit A at 101-03 (disobeying court order to produce tax returns); 107 (testimony that income was declared; later documentary evidence established that it was not).

by his countrymen in his own country.[13]

IV. PROCESS WAS INSUFFICIENT.

Defendant Van Cauwenberghe has also moved to dismiss for insufficiency of process pursuant to Rule 12 (b) (4) of the Federal Rules of Civil Procedure, because the papers which he received did not comply with the clear requirements of the Rules.

• • • •

V. SERVICE OF PROCESS WAS INSUFFICIENT.

The same deficiencies which render the process insufficient invalidate its service. In addition, there are other flaws that call for dismissal pursuant to Rule 12(b)(5), Federal Rules of Civil Procedure.

• • • •

[13] The fact that a plaintiff attempts to include U.S. federal claims does not allow escape from dismissal for *forum non conveniens*. *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 514 (S.D.N.Y. 1982) (Weinfeld, J.) (dismissing federal securities fraud complaint).

EXHIBIT A

[Excerpts From Transcript of Proceedings
United States v. *Blair, et al.*, No. CR 84-964 AAH
(U.S.D.C., C.D. Cal.)]

[TESTIMONY OF ROGER BIARD]

[Direct examination]

* * * *

[5] Q. Mr. Biard, I understand that you are from Belgium; is that correct, sir?

A. Yes.

Q. Where do you live now, Mr. Biard?

A. In Brussels.

Q. Are you a Belgian citizen?

A. Yes.

Q. Are you employed or engaged in a profession?

A. Yes, sir.

Q. What is your—which profession are—

A. I am the head of a stockbroker firm.

THE COURT: Head of a what?

THE WITNESS: A stockbroker firm.

THE COURT: A stockbroker firm?

* * * *

[7] Q. How was it brought to your attention, sir?

A. By Mr. Van Cauwenberghe.

Q. Could you state his full name, please?

A. Wilfried Van Cauwenberghe.

Q. How did you know Mr. Van Cauwenberghe?

A. Through my family.

Q. Was he a close friend?

A. No, sir.

Q. Had you done business with Wilfried Van Cauwenberghe before?

A. Never.

* * * *

[8] Q. Mr. Biard, again directing your attention to the period around 1979 and your contacts with Wilfried Van Cauwenberghe.

Was this the first time that Wilfried Van Cauwenberghe had discussed investments with you?

A. Yes.

Q. When did you talk with Mr. Van Cauwenberghe?

A. Well, sometime in '79. Late summer, I think.

Q. What, if anything, did Wilfried Van Cauwenberghe tell you about possible investments in the United States?

A. Sorry. I didn't hear you very well.

Q. What, if anything, did Wilfried Van Cauwenberghe tell you about possible investments in the United States?

A. Yes.

He told me—he told me to on my next trip to America to come to try to meet him in Los Angeles and he had some opportunities to discuss with me.

Q. Did he tell you what those opportunities were at that time?

A. No.

[9] Q. Did you make a trip to the United States, Mr. Biard, to see Mr. Van Cauwenberghe and discuss those opportunities?

MR. TWITTY: Objection. It is complex.

THE COURT: Overruled. Proceed.

BY MR. ARTERBERRY:

Q. Mr. Biard, did you understand my question?

A. Yes.

Q. Did you make such a trip, Mr. Biard?

A. Yes.

* * * *

[15] Q. Mr. Biard, during your stay in Los Angeles, did you have any discussions with Mr. Van Cauwenberghe about investments in the United States?

A. Yes.

Q. When did those discussions first occur?
A. After I arrived in my hotel.
Q. Who was present?
A. The two Van Cauwenberghe brothers.
THE COURT: What date was this?
THE WITNESS: I don't remember.
THE COURT: How long after you got into Atlanta? You must remember that.
THE WITNESS: Yes. I arrived the 16th in Atlanta and four or five days afterwards, I was—
THE COURT: Five days afterwards you were in Los Angeles so that is the 21st?
THE WITNESS: Yes. Probably. Yes.

* * * *

[18] Q. Who was present at the lunch, Mr. Biard?
A. The two brothers Van Cauwenberghe and a new person called Alan Blair.
Q. Who introduced you to Mr. Blair?
A. Mr. Van Cauwenberghe did.
Q. You had never met Mr. Blair before?
A. No.

* * * *

Q. Were there any business discussions at the lunch, Mr. Biard?
A. During the lunch, no.

* * * *

[19] Q. Did you have any further business discussions while you were in Los Angeles?
A. In the afternoon.
Q. Who was present at those?
A. The two brothers Van Cauwenberghe.

* * * *

[20] Q. Tell us what he told you?
A. He said that they were the owner of a property of more than 200 houses.
THE COURT: What?
THE WITNESS: A property. They were the owner of a property of more than 200 houses that had to be—

THE COURT: Two hundred thousand what? Bricks, mortar?
THE WITNESS: Houses.
THE COURT: Thousand what?
THE WITNESS: Houses.
THE COURT: Two hundred thousand—
THE WITNESS: Houses.
THE COURT: All right.
THE WITNESS: Houses. Those buildings had to be renovated to be sold. That was the idea. But they didn't have enough cash to complete the work, so they did ask me for a loan.
Q. Who asked you, sir?
A. Wilfried Van Cauwenberghe.
Q. What did he say to you?
A. He said that the loan of one and a half million would be certainly very good. It wouldn't be enough, but that would help a lot.
Q. What was your reaction, Mr. Biard?
[21] A. My reaction was that first I didn't have the one and a half million. I said eventually I could afford one million. No more.
Q. At that time, did you agree to make the loan?
A. I didn't say so.
Q. Did Mr. Wilfried Van Cauwenberghe discuss the terms of the loan?
A. Yes.
He said that would be a loan over three years with a 20 percent interest rate.
Q. Would there be any security? Did he tell you whether there would be any security?
A. Yes.
There would be a security of the mortgage.
Q. Did he identify what that mortgage would relate to?
A. Yes. To the property, naturally.

Q. What property?
A. Concorde Bridge in Kansas City.
Q. Did anyone provide you any materials relating to Concorde Bridge Townhouses?
A. Yes.
I received a book with a complete description—a big book with a complete description of the property.
Q. Who gave that to you?
A. Mr. Van Cauwenberghe.

* * * *

[23] Q. With whom did you meet?
A. The two brothers Van Cauwenberghe.
Q. Did you discuss the $1,000,000 loan?
A. Yes.
THE COURT: Where and when and in whose presence?

BY MR. ARTERBERRY:
Q. Where did the meeting occur, Mr. Biard?
A. Still in my hotel room.
Q. Who was present?
A. The two brothers Van Cauwenberghe.

* * * *

[28] Q. What, if anything, did you tell Mr. Van Cauwenberghe about the check?
A. What did he tell me?
THE COURT: What did he tell you?
THE WITNESS: He told me to leave it blank, the name of the beneficiary because—
THE COURT: You say "beneficiary." We say "payee." Do you know—
THE WITNESS: Oh. I am sorry. I am a foreigner, Your Honor.
THE COURT: Don't you call them "payee" over in Belgium?
THE WITNESS: Beneficiary. That is the French word.
THE COURT: We say "payee."

THE WITNESS: He told me he didn't know who the payee would be yet, so I left it blank without any name.
THE COURT: All right.

* * * *

[31] Q. Did you discuss this loan with Mr. Blair at this time?
A. Yes. At this time. Yes.
THE COURT: Where?
THE WITNESS: In my hotel room.
THE COURT: When?
THE WITNESS: After I signed the check he came in also in the hotel.
THE COURT: Who was present at this meeting?
THE WITNESS: The two Van Cauwenberghe brothers and Blair.

BY MR. ARTERBERRY:
Q. Did you discuss your loan with Mr. Blair?
A. Yes. He thanked me for it.

* * * *

[32] Q. Did you ever receive any formal loan documentation concerning your loan?
A. Yes. A sample.
THE COURT: A what?
THE WITNESS: A sample.
THE COURT: A samba?
THE WITNESS: Yes.
THE COURT: A samba is a dance.
THE WITNESS. A sample. S-A-M-P-L-E.
THE COURT: You were given a sample?
THE WITNESS: Yes, well—

* * * *

[34] Q. Would you examine the document before you marked for identification as government's exhibit 3? Have you had an opportunity to examine it, Mr. Biard?
A. Yes.

Q. Do you recognize that document?
A. Yes, sir.
Q. What is it, sir?
A. The promissory note and the mortgage that I received.
Q. When did you receive that, Mr. Biard?
A. A few days after.
THE COURT: Where?
THE WITNESS: In Belgium.

BY MR. ARTERBERRY:

Q. From whom, Mr. Biard?
A. From Van Cauwenberghe.

• • • •

[37] Q. Mr. Biard, from whom did you receive government's Exhibit 3?
A. From?
Q. From whom did you receive Government's Exhibit 3?
THE COURT: He has testified to that. He said from the defendant Van Cauwenberghe.
THE WITNESS: From Van Cauwenberghe.
THE COURT: How did you receive it.

BY MR. ARTERBERRY:

Q. How did you receive it?
A. That was brought in my office in Brussels. That was brought to me.
THE COURT: By whom?
THE WITNESS: By Van Cauwenberghe.

BY MR. ARTERBERRY:

Q. Full name, Mr. Biard.
[38] A. Wilfried.
Q. Mr. Biard—

THE COURT: He came in personally and gave it to you?
THE WITNESS: Yes, sir.

• • • •

Q. Mr. Biard, in the months after you had returned to Belgium after making this $1,000,000 loan, did you have any discussions about Concorde Bridge townhouses with Wilfried Van Cauwenberghe?
A. Yes.
Q. What, if anything, did he say?
THE COURT: What date was it?

BY MR. ARTERBERRY:

Q. On what dates or date did you have this discussion?
A. I frankly don't remember.
Q. Was it more than one time?
A. Well, perhaps a couple of months afterwards.
THE COURT: What was the date when he delivered this to you?
[39] A. That must have been in November. Beginning of November.

• • • •

Q. When did you return to Belgium from Los Angeles, Mr. Biard?
A. I stayed in Los Angeles probably three days and then I returned to Brussels through Atlanta because I had my return ticket going through Atlanta.
Q. Do you know approximately what date you arrived in Brussels?
A. Well, the following day.
Q. Do you know approximately what date that was, sir?
A. No, sir.
Q. That was still in the month of October?
A. Must have been. Yes.

• • • •

[40] Q. Using that as a reference, Mr. Biard, can you tell us now when you received the note and mortgage before you now as Government's Exhibit 3?

A. I received those documents a few days after my return and I am unable to say at what date.

Q. Now, Mr. Biard, in the time following your return to Brussels, did you have occasion to discuss Concorde Bridge townhouses with Wilfried Van Cauwenberghe?

A. Yes.

Q. How many times, sir?

A. Well, every time we saw each other, I used to ask how the project was going and I got the answer every time that it was—everything was fine and the project was going well.

Q. Who told you that, sir?

A. Wilfried Van Cauwenberghe or Christian Van Cauwenberghe.

MR. LITT: Objection, Your Honor.

BY MR. ARTERBERRY:

Q. Did you have any discussions with Wilfried Van Cauwenberghe, Mr. Biard?

A. With whom?

Q. Wilfried Van Cauwenberghe?

A. Yes.

Q. What did he tell you about Concorde Bridge Townhouses, [41] if anything?

A. He told me that he was in charge of the commercial aspect of the project and that everything was going fine and a few houses were already—a few buildings were renovated and a few were already sold.

Q. Did you have any discussions with Alan Blair after you returned to Brussels after you had—

A. When he came over in Belgium, I certainly did ask him that and he gave me the same answer.

• • • •

[42] Q. Mr. Biard, after you received the note and mortgage, did you have any additional discussions with Wilfried Van Cauwenberghe about Concorde Bridge townhouses?

MR. LITT: That has been asked and answered. We are on to Blair.

THE COURT: Overruled.

THE WITNESS: Yes, I had.

BY MR. ARTERBERRY:

Q. When did those occur, Mr. Biard?

A. Perhaps one month after.

Q. Can you be more specific than that?

A. No, sir. I am sorry.

[43] Q. What did Mr. Van Cauwenberghe tell you about this?

THE COURT: Who was present. When did it happen. Lay the foundation.

BY MR. ARTERBERRY:

Q. Where did it take place, Mr. Baird?

A. Probably at lunch time.

Q. Do you know where?

A. In the restaurant. Yes. I did.

Q. Where did it happen?

A. At lunch time in a restaurant.

Q. Where?

A. At lunch time in a restaurant?

Q. What restaurant?

A. A suppose it is "The Swan." That restaurant is called, "The Swan."

THE COURT: *Le Cygne?*

THE WITNESS: The Swan. Yes.

BY MR. ARTERBERRY:

Q. When was it, you say?

A. One month after—

Q. One month after what?
A. —I received these.
Q. After you—
A. After my return to Belgium.
Q. Who was present, Mr. Biard?
[44] A. Wilfried Van Cauwenberghe.
Q. Anyone else?
A. No.
Q. What, if anything—
THE COURT: Who said what?
THE WITNESS: His brother, perhaps. I don't remember.
THE COURT: Who said what?
THE WITNESS: Well, I did ask Van Cauwenberghe how the project in Kansas City was going and he said it was going very well and they were very satisfied.

BY MR. ARTERBERRY:

Q. Did he tell you any other specifics?
A. No, but a few houses were already renovated and ready for sale and, more than that, a few had been already sold.
Q. Now, Mr. Biard, after you returned to Brussels and after you had received the note and mortgage, did you have any discussions with Alan Blair about Concorde Bridge Townhouses?
A. Yes.
Q. When did those occur, Mr. Biard?
A. Well, I didn't have a lot of discussion about that. I did ask the same question. They were satisfied.
THE COURT: You are not answering the question. When and where did the discussion with Blair take place?
THE WITNESS: Well, Blair must have come in my office a [45] few months after my return to Belgium.

BY MR. ARTERBERRY:

Q. What did Mr. Blair tell you, if anything, about Concorde Bridge Townhouses at that time?
A. He told me that everything was fine and going well.

* * * *

THE COURT: Mr. Biard, The Swan date, please. Was it at The Swan or your office?
THE WITNESS: In my office with Blair.
THE COURT: Yes.
THE WITNESS: After that, probably a meeting at The Swan.
THE COURT: How long after the Swan meeting with Van Cauwenberghe did—
THE WITNESS: Say one month.

* * * *

[52] Q. Did you have any discussions with anyone before that payment was made about the arrangements for the repayment?
A. Yes.

* * * *

Q. Mr. Biard, where did those discussions take place?
A. In Belgium.
Q. When did it take place?
A. Again, I am sorry. I can't answer. During one of the many, many stays of Mr. Blair in Belgium.
Q. Was it before the first payment was made?
A. Yes. It was before.
Q. Who was present at the meeting?
A. Mr. Blair and Mr. Van Cauwenberghe.
Q. Where did it take place?
A. In my office and I was asked where did I want the money back.

* * * *

[58] THE WITNESS: The first time I saw—the first occasion I saw Wilfried Van Cauwenberghe.

THE COURT: When? The first occasion back in October in 1979.

THE WITNESS: No. In 1981.

THE COURT: That is not the first occasion you saw him.

THE WITNESS: *Oui.*

What I had in mind is on the first—the first opportunity after that payment to see Mr. Van Cauwenberghe, I told him that that first payment was late.

BY MR. ARTERBERRY:

Q. Where did that meeting take place, Mr. Biard?
A. That took place in Brussels.
Q. Where in Brussels?
A. I don't remember where.
Q. Do you remember who was present?
A. Yes. Wilfried Van Cauwenberghe.
Q. Did Mr. Van Cauwenberghe respond?
A. He told me that he would inquire and see what was the reason for that late payment.

* * * *

[63] THE WITNESS: At the first opportunity in 1982 I expressed my displeasure to Christian Van Cauwenberghe.

MR. LITT: Objection, Your Honor.

THE COURT: Wait a minute. If he has answered, it is too late for an objection.

THE COURT: You can ask for a motion to strike—

MR. LITT: I'd ask for a motion to strike it because he is talking about conversations with Christian Van Cauwenberghe.

THE WITNESS: That is the brother of Wilfried.

BY MR. ARTERBERRY:

Q. It is the brother of Wilfried Van Cauwenberghe. I said "where," not "who."
A. Where? In Brussels.

Q. Who was present?
A. Christian Van Cauwenberghe and I.
Q. Not Wilfried?
A. No.

* * * *

[64] Q. Referring to the discussion you had with Mr. Van Cauwenberghe after the payment was made, what did you say at that time?

THE COURT: Where.

BY MR. ARTERBERRY:

Q. Where did that discussion take place?
A. In Brussels.
Q. When, as best you can remember?
A. I suppose during the month of March.
Q. Who was present, sir?
A. Christian Van Cauwenberghe and his brother, Wilfried.

* * * *

A. When was it due? The third and final loan payment was due the 31st of October, 1982.

THE COURT: All right.

BY MR. ARTERBERRY:

[66] Q. Prior to that time, Mr. Biard, did you have any discussions with anyone—
A. Yes.
Q. —About what payment?
A. Yes.
Q. With whom?
A. Alan Blair.
Q. When did those take place?
A. They took place in my office and I think that was in June, 1982.
Q. Who was present, Mr. Biard?
A. Alan Blair and I.

* * * *

[77] THE WITNESS: I must have explained myself backwards.

THE COURT: I think you better explain. You didn't know the name or you didn't read it?

THE WITNESS: Yes, sir. I did read it, but—

THE COURT: What did you think it meant?

THE WITNESS: I don't speak English all the time.

THE COURT: You are not speaking English. You are reading it.

THE WITNESS: I read that. I read that.

THE COURT: I don't understand you, honest to goodness. You are not a babe in the woods. You knew who made that note—

THE WITNESS: Surely.

THE COURT: —and the mortgage to you.

THE WITNESS: Surely.

THE COURT: Why do you say you don't know?

THE WITNESS: Well, I didn't explain myself well enough.

THE COURT: All right. Do it well enough. Explain yourself. What do you mean?

THE WITNESS: What was the question, again, please?

* * * *

[78] Q. Did any of the defendants ever tell you anything about Three-B Investment Associates?

A. Yes. It was a group.

THE COURT: When, where and who.

BY MR. ARTERBERRY:

Q. When did this discussion or discussions take place?

A. In 1979 in Los Angeles.

Q. Where?

A. At a hotel.

Q. Who was present?

A. The two Van Cauwenberghes.

Q. Did Wilfried Van Cauwenberghe at that time tell you anything about Three-B Investments Associates?

A. Not specifically, but when Alan Blair came, I was told more about it.

Q. By whom?

A. Alan Blair.

Q. Who was present?

A. The two Van Cauwenberghes and I.

* * * *

[80] A. Three-B Associates was owning the Concorde Bridge complex. That, I was told.

Q. By whom?

A. The complex was owned by Three-B Associates.

Q. Who told you that, Mr. Biard?

A. Blair.

Q. Thank you.

THE COURT: In the presence of Van Cauwenberghe?

THE WITNESS: Yes, sir.

THE COURT: All right. I mean Wilfried, the defendant. All right. You understand that? Go ahead.

MR. ARTERBERRY: Your Honor, it is a little late for the government to point this out, but the witness, I understand, has a slight hearing problem and I thought this—

THE COURT: Well, it is a little late. Nobody told me that. I thought you just didn't understand English sometimes. Go ahead.

* * * *

[CROSS-EXAMINATION]

[87] Q. Mr. Biard, the registered receipt was dated October 1st of 1983; is that correct?

A. Yes.

Q. And that was some eight months after you had consulted Mr. Dobbins, your Atlanta attorney; is that right?

A. Yes.

Q. And that was also some number of months after you had consulted John Eardley in this matter; is that right?

A. Yes.

Q. And that was several months after you had filed a complaint with the Swiss police in this matter; is that right?

A. Yes.

Q. And indeed, just two or three days before that, you had been in Atlanta talking to the F.B.I. about this matter; is that right, at the end of September, 1983?

A. Yes.

* * * *

[99] Q. And it is not a fact, Mr. Biard, you did not report on those tax returns the money that is in your National Bank of Georgia account?

A. Let me say that the Belgian tax authorities know very well about this case and about the account I maintain in the United States. They are well aware of that.

Q. Mr. Biard, that is not the question I asked you.

I asked you whether you reported on your tax returns in 1979, 1980 and 1981—

A. Well—

Q. May I finish, please?

A. According to our laws, I don't have to report anything until I start to receive the proceeds of interest from the loan.

Q. Mr. Biard, in—

A. The loan first has to be reimbursed.

Q. Mr. Biard, in 1980 you received a payment that consisted of 165,000 principal and $200,000 interest; is that correct?

A. In my opinion, it was reimbursement of the capital.

Q. Mr. Biard—

A. In my country, we always wait until the capital is reimbursed, then we take into account the interest and so far, the capital has not been reimbursed. There is still [100] $200,000 missing.

Q. Mr. Biard—

THE COURT: When you say "capital," I don't know --do you mean "principal"?

THE WITNESS: Principal.

THE COURT: "Principal" was distinguished from "interest"?

THE WITNESS: Principal.

BY MR. LITT:

Q. Mr. Biard, look at the promissory note, which I believe is exhibit 2 in evidence.

Would you get that in front of you, please?

A. Yes. It is over there.

Q. Would you open it, please?

THE COURT: Promissory note. Exhibit 3. All right.

BY MR. LITT:

Q. Do you see the paragraph there where it says that you will be repaid the principal sum of $1,000,000 with interest on the entire face amount of the promissory note at the rate of 20 percent per annum?

Do you see that?

A. Uh-huh.

Q. Would you read to the jury the paragraph immediately below that that begins, "at the expiration of one year"?

A. What must do I?

[101] Q. Read to the jury the paragraph that begins, "at the expiration of one year."

A. "At the expiration of one year from the date of this note, $165,000 principal plus accrued interest."

Q. That was, "plus accrued interest"?

A. "Plus accrued interest."

Q. That made a total of $365,000?

A. Yes.

Q. And would you read the next paragraph to the jury, too, which discusses the second repayment?

A. "On or before the expiration of two years from the date of this note, $235,000 principal plus accrued interest."

Q. So the first payment was $165,000 plus $200,000 interest, according to the note; is that correct?

A. According to the note, yes.

Q. And the second payment was $235,000 principal plus $200,000 interest.

Mr. Biard, you are aware, are you not, that the court ordered you to turn over your tax returns in this matter in response to this letter?

Are you aware, Mr. Biard, that the court ordered that you produce your tax returns in connection with this case?

A. You did ask for that.

Q. Were you never told by Mr. Arterberry that the court [102] had ordered that the tax returns be produced?

A. Yes.

Q. So, you knew that the court had ordered that the tax returns be produced?

A. Yes. When I was here.

Q. And you disobeyed the orders of the court.

A. Let me remind you, if you don't mind, that I received this letter from you asking all that at the beginning of November, a few days ago.

Q. Actually, it was received on November 4th, wasn't it?

A. Probably. Yes.

Q. And that was almost two and a half weeks ago?

A. Yes.

Q. Now, I will ask you again. Why did you deliberately disobey the order of the court to produce these tax returns?

A. What I thought—what I thought was that most probably you had no right to ask me all that and that I would first inquire to know if it was correct or not.

Q. But you are aware that the court ruled that you had to produce them?

A. Yes. I am aware of that since a few days now.

Q. And you did not produce them?

A. Nor can I. I have to ask the chartered accountants who are making my tax returns.

Q. Did you contact the chartered accountants?

[103] A. I can't from here.

Q. Do you have a telephone?

A. No, sir. In Brussels. Not here.

Q. To your knowledge, does a telephone service extend between Los Angeles and Brussels?

A. I know that.

Q. Can you call your chartered accountant and ask him to produce those?

A. I don't have his number.

Q. Is your son back at the office at Biard & Company?

A. Sure. My son must be there.

Q. Does your son have the number of the accountant?

A. I don't know.

Q. Is the number of the accountant in your office?

I think things will run more smoothly if you wait until I finish.

THE COURT: The witness can answer any way he wants. You can ask the question. It is open-ended.

THE WITNESS: The chartered accountant that does my son's tax returns is not the same one that does my tax returns, so I don't think my son has the telephone number.

BY MR. LITT:

Q. Mr. Biard, Is it your testimony that there is no one in Brussels from whom you can find out the telephone number of your chartered accountant?

* * * *

[107] Q. In fact, the account at the National Bank of Georgia earned tens or even hundreds of thousands of dollars in interest; is that correct?

A. Yes.

Q. Did you report that income to the Belgian tax authorities as you received it?

A. That is in my returns. Certainly. Yes.

Q. That is in the returns?

That is in the returns that you didn't produce in response to the court's order for the jury to see?

A. The Belgian tax authorities are aware of that.

Q. They may be aware of it now, but that is not the question.

THE COURT: The question is: Did you make a return on it?

THE WITNESS: Yes.

THE COURT: All right. I order it produced or I will throw your testimony out. I warned the government on this and I warn you. Have it put in the air mail special delivery from Belgium today.

THE WITNESS: Yes. I will do it.

* * * *

[110] THE COURT: You gave it to whom?

THE WITNESS: To Mr. Arterberry. To the F.B.I., I think.

THE COURT: All right. Where is it? I am looking at the government.

THE WITNESS: In any case, I don't have the book any more.

MR. ARTERBERRY: Can I inquire of the witness a couple questions?

Did you give the brochure that you are referring to—did you give it to the United States Government or did you give it to the Swiss authorities?

THE WITNESS: I am sorry. I am mistaken. That is my memory. I must have given that to the Swiss authorities.

MR. ARTERBERRY: Thank you.

BY MR. LITT:

Q. When did you give it to the Swiss authorities?
A. When?
Q. When.
A. When?

Q. When. Yes.

A. Well, at the time of my complaint to the Swiss authorities.

* * * *

[127] Q. And you testified that you were not very close friends with Mr. Cauwenberghe, but he was on a close enough basis to use the pronoun "*tu*," t-u with you; wasn't he?

A. Again. I am sorry. Repeat,

Q. There is a difference, in French—there are two different ways to address somebody in French. You can use "*tu*" or you can "*vous*"; isn't that right?

A. Yes.

Q. That is "*tu*," t-u and "*vous*", v-o-u-s, and "*tu*" is much more familiar; isn't that right?

It indicates a certain degree of friendship.

A. Yes.

Q. You wouldn't use the word "*tu*" with a client of your stock brokerage firm, would you? You wouldn't use "*tu*" with a colleague or with a client?

A. With whom?

A. A client.

A. A client?

Q. Yes.

A. No. Naturally. No.

Q. But you would with a friend?

A. A friend. A comrade or a colleague.

[126] Q. And—

A. In my trade, we always say "*tu*."

Q. And you and Mr. Van Cauwenberghe used "*tu*" with each other; didn't you?

A. Right.

Q. And you continued to use "*tu*" after December, 1982 when you didn't receive the third repayment from Mr. Blair?

A. If I remember, I never saw Mr. Van Cauwenberghe any more.

Q. I will come to that later.

In fact you were with Mr. Van Cauwenberghe when he learned that his wife died; weren't you? You were with Mr. Van Cauwenberghe when he learned that his wife died; weren't you?

A. Is there an interpreter perhaps to help me?

THE COURT: Speak loud.

* * * *

You were with Mr. Van Cauwenberghe when he learned—when Mr. Van Cauwenberghe learned that his wife died; weren't you, in the Le Cygne Restaurant in February of 1981?

A. I think, yes, but I am not positive about that.

Q. And you sent him condolences on the death of his wife?

[127] A. What?

Q. You sent him—

THE COURT: A sympathy letter.

THE WITNESS: Yes. Perhaps. Yes. Probably.

* * * *

[135] Q. You had an attorney in Belgium, too, didn't you, a Mr. Spreutels?

A. Who?

Q. Mr. Spreutels. I am not sure how to pronounce it. Daniel Spreutels.

A. Spreutels?

Q. Yes. He is your lawyer in Belgium?

A. Yes.

Q. Did you ever ask Mr. Spreutels to send a letter to Mr. Van Cauwenberghe demanding that Mr. Van Cauwenberghe repay you?

A. I didn't ask anything. Mr. Spreutels is the lawyer for the Vanden Stock family.

Q. He is representing your interests in this matter; is that right?

A. Yes. Well, yes.

* * * *

[137] Q. Between December, 1982 when you did not get paid and 1985, the beginning of this year, when Mr. Van Cauwenberghe was arrested on your complaint, did you ever bring suit against Mr. Van Cauwenberghe in Belgium?

A. No.

Q. Did you ever bring suit against him in Switzerland?

A. Yes.

Q. Civil suit?

A. No.

Q. You brought a criminal complaint?

A. Uh-huh.

Q. Did you ever bring civil suit against him prior to his arrest in the United States?

A. Against Blair?

Q. Against Van Cauwenberghe.

A. In the States?

Q. Yes.

A. Well, I complained in the States.

Q. Civil suit?

A. Civil suit, two or three days ago.

* * * *

[139] A. Well, I saw him, but, naturally, after awhile, I stopped seeing him.

Is that what you are asking for?

Q. I am asking you to tell the truth.

A. When I found that the third and last installment was not made, I certainly talked with Mr. Van Cauwenberghe and I told him, "Is it going to be paid or not?"

Q. Is there one piece of paper, Mr. Biard, that says that?

It is a simple—

A. I don't need to write it if I see him.

Q. It is a simple question that can be answered "yes" or "no."

Is there or is there not any piece of paper that shows you sought the repayment of this money from Mr. Van Cauwenberghe?

A. No.

Q. Is there anything in Belgian law that would have prevented you from suing Mr. Van Cauwenberghe in Belgium?

A. Is there anything in the Belgian law that—

Q. That would have stopped you from bring a lawsuit against Mr. Van Cauwenberghe if you thought he owed you money?

A. I don't think so.

Q. In fact, it would have been pretty convenient. You [140] live in Brussels; right? He lives in Brussels; right?

A. Yes.

Q. You are both there.

A. Yes.

Q. You didn't bring a lawsuit in Brussels; did you?

A. No.

Why should I have done that? The case was in Switzerland and here.

Q. My point is that you chose to bring a criminal case instead of a civil case; is that right?

A. Yes.

Q. And you didn't bring the criminal case in Belgium; did you?

A. No.

Q. You went to Switzerland.

A. Yes.

Q. And then you came to the United States?

A. I first went to the United States.

Q. But you never went to Belgium with it?

A. No.

Q. And you never filed any civil suit in Belgium?

A. No.

Q. You decided—

A. So far.

• • • •

[164] I will ask Mr. Biard whether the translation of that sentence is accurate.

Q. Is that an accurate translation of that sentence that says, *"C'est avec Alan Blair que j'ai traité toute l'operation."*

That is accurate?

A. That is.

Q. Thank you.

That is a phrase, not a sentence.

THE COURT: For the record, that is, "I handled the whole matter with Blair."

• • • •

MR. LITT: That is a translation.

THE COURT: Did you want to explain why it was that you told the Swiss police in your letter that you handled the whole matter with Alan Blair whereas today you said Mr. Van Cauwenberghe asked you for a 1.5 million dollar loan?

THE WITNESS: As I just said, I had to be more precise [165] with the Swiss police and what we don't have here are the questions, but you have my answers.

BY MR. LITT:

Actually, we do have the questions here, sir.

If you look at exhibit 303—you are talking about the next document. I am talking about the difference between what you told the jury here today and what you told the Swiss police in the letter that you prepared after consulting with Mr. Eardley.

A. Repeat slow.

Q. Sorry.

THE COURT: Come on. Get it straight. You wrote a letter to the Swiss police, exhibit 302.

THE WITNESS: Yes.

• • • •

[II-54] THE WITNESS: The message says that Mr. Blair must leave Brussels but that he would—

THE COURT: Let's do it in French, then the translator can translate it.

THE WITNESS: I say it in French.

(Whereupon witness reads sentence in French.)

THE INTERPRETER: "He must leave Brussels and he will come back next week to set an appointment."

MS. WOODS: May I have a moment, Your Honor?

Q. Mr. Biard, when you received this phone message, were you in the office?

A. Certainly not, otherwise I wouldn't have found that note on my desk.

Q. Were you tied up because your son was getting married at that time, Mr. Biard?

A. Maybe. Most probably. If it was the day. I must confess that I forgot the day of the marriage of my son.

* * * *

[II-66] Q. Mr. Biard, what is your native language?

A. French.

Q. How many other languages do you speak?

A. Well, I speak Spanish and English. I try.

Q. Are you fluent in three languages, French, Spanish and English?

A. Yes.

Q. Do you conduct—I am sorry. I thought you had finished. If you would like to finish your answer, go ahead.

A. No. No. No. No. No. It is finished.

Q. Do you conduct business in French, Spanish and English?

A. Yes.

Q. Have you conducted business in French, Spanish and English for the last 20 years?

A. Yes.

Q. Do you ever conduct any part of your business by telephone?

A. Yes. Most of them.

* * * *

[II-89] Q. Did you read the answers before you signed them?

A. Yes.

Q. Are you familiar with the phrase, "due diligence"?

A. *Oui.* Yes.

Q. What does that phrase mean to you?

A. "Speed." If I translate correctly, "speed."

Q. Speed?

Are you familiar with the use of the word "due diligence" in business affairs?

A. No. I don't know what—that is in English. No, I don't know that.

THE COURT: What is it in French?

THE INTERPRETER: With every possible precision—accuracy.

THE COURT: With every attention to every possibility within reason to arrive at an accurate conclusion or decision.

THE WITNESS: Yes.

THE COURT: How do they say it in French? They don't say "due diligence"?

THE WITNESS: *"Tout le diligence."*

THE COURT: *"Tout le diligence."* With all diligence.

THE WITNESS: With all the speed possible.

* * * *

[II-91] Q. When you use the word "society"—

A. Yes. I mean "corporation."

Q. —does that mean the same thing as "corporation"?

A. Yes. We say "*société*" in French.

Q. In French, a "*société*" or "society" is the same word or same thing as "corporation"; is that correct?

A. Uh-huh.

* * * *

[128] THE COURT: You signed the complaint, I take it?

THE WITNESS: Yes.

THE COURT: When?

THE WITNESS: Well, Tuesday.

THE COURT: That was the first time you conferred with the lawyer?

THE WITNESS: No. He already knew that he had to file a complaint.

THE COURT: How did he know that? I thought you say you conferred with him on Tuesday the 12th? How could you sign it the same day you conferred with him?

THE WITNESS: The Swiss attorney—

THE COURT: The Swiss attorney?

THE WITNESS: Yes. He got in touch with the American attorney and asked him to start filing a complaint for civilian purposes.

THE COURT: Who is your civil attorney in Switzerland and who is your civil attorney here?

THE WITNESS: The name of the Swiss attorney is "Eardley."

* * * *

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

DECLARATION OF WILFRIED VAN CAUWENBERGHE

WILFRIED VAN CAUWENBERGHE declares as follows:

1. I am a citizen and legal resident of Belgium, and of no other country. I am temporarily in the United States pursuant to an order of the United States District Court for the Central District of California.

2. On information and belief, Alan H. Blair is a citizen of the United States and a legal resident of the United Kingdom. His wife, Monique Mat, is a citizen of Belgium and legal resident of the United Kingdom. Gerald L. Bilton is a citizen and legal resident of Indiana.

3. I am informed by Belgian counsel that the courts of Brussels, Belgium are open and would have jurisdiction of any suit brought by Roger Biard against me for any of the acts alleged in the First Amended Complaint herein.

4. At approximately 3:00 p.m. on February 5, 1986, Percy Anderson and another man stopped me as I was entering the office of probation officer James O. Allen to keep an appointment with Mr. Allen. I had told no one else of the appointment. They asked me to accept some documents. I declined. They left the documents in the

outer office. Later Mr. Allen, whose name was also written on an envelope containing the documents, opened it and gave the contents to me. A true and correct copy of the first page of the contents is attached hereto as Exhibit 1. I delivered the actual documents I received to my attorney for filing with this Court.

5. My command of the English language is limited. I normally communicate with my attorneys in the French language.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. this 21st day of February, 1986.

/s/ Wilfried Van Cauwenberghe
WILFRIED VAN CAUWENBERGHE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Lodged Feb. 26, 1986]

REQUEST TO ENTER DEFAULT OF WILFRIED VAN CAUWENBERGHE; DECLARATION OF PERCY ANDERSON IN SUPPORT THEREOF

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

PLEASE ENTER the default of defendant, Wilfried Van Cauwenberghe for failure to plead or otherwise defend pursuant to Rule 55(a) of the Federal Rules of Civil Procedure upon the Declaration of Percy Anderson in Support of Request to Enter Default dated February 26, 1986, attached hereto:

DATED: February 26, 1986.

BRYAN, CAVE, MCPHEETERS & MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

By /s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

DECLARATION OF PERCY ANDERSON IN SUPPORT OF REQUEST TO ENTER DEFAULT

I, Percy Anderson, declare as follows:

1. I am an attorney duly licensed to practice before all courts of the State of California. I am associated with the law firm of Bryan, Cave, McPheeters & McRoberts, attorneys of record for plaintiff Roger Biard in this action.

2. The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

3. This Declaration is made in support of Plaintiff Roger Biard's request to the Clerk of this Court to enter the default of defendant Wilfried Van Cauwenberghe (hereinafter "Van Cauwenberghe") in this action.

4. On February 5, 1986, Van Cauwenberghe was personally served with a copy of the First Amended Summons and Complaint for Damages, Fraud, Breach of Contract, Unjust Enrichment, Breach of the Covenant of Fair Dealing and Wrong Denial of the Existence of a Contract, dated November 12, 1985 (hereinafter the "Complaint"), in this action, by Greg Elliott, a person authorized to serve the First Amended Summons and Complaint under Rule 4(c) of the Federal Rules of Civil Procedure as appears from the Proof of Service, dated February 10, 1986. A true and correct copy of the Proof of Service is attached hereto as Exhibit A.

5. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Van Cauwenberghe had until February 18, 1986, to answer, move or otherwise respond to the Complaint.

6. Van Cauwenberghe has not answered, moved or otherwise responded to the Complaint.

7. The time for Van Cauwenberghe to answer, move or otherwise respond to the Complaint has not been extended by plaintiff.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 26th day of February, 1986, in Los Angeles, California.

/s/ Percy Anderson
PERCY ANDERSON

[Exhibit omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Feb. 27, 1986]

ORDER GRANTING LEAVE TO APPEAR SPECIALLY PRO HAC VICE

Upon consideration of the application of John G. Kester for leave to appear specially *pro hac vice*, it is by the Court this 27th day of February, 1986

ORDERED that the said application be and it is hereby granted.

/s/ J. Spencer Letts
U. S. D. J.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Feb. 27, 1986]

DEFAULT BY CLERK

It appearing from the records in the above-entitled action that summons has been served upon the defendant(s) named below, and it further appearing from the affidavit of counsel for Plaintiff, and other evidence as required by F.R.C.P. 55(a) and Local Rule 14.10 that each of the below defendants have failed to plead or otherwise defend in said action as directed in said Summons and as provided in the Federal Rules of Civil Procedure:

Now, therefore, on request of counsel, the DEFAULT of each of the following defendants is hereby entered:

WILFRIED VAN CAUWENBERGHE.

DATED: 2-27-86.

By /s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Apr. 3, 1986]

**MOTION TO STRIKE REQUEST TO ENTER DEFAULT;
MOTION TO SET ASIDE DEFAULT;
REQUEST FOR SANCTIONS;
DECLARATION OF JOHN G. KESTER**

TO PLAINTIFF ROGER BIARD and his attorney of record, PERCY ANDERSON:

NOTICE IS HEREBY GIVEN that on April 28, 1986, in the courtroom of the Honorable J. Spencer Letts at the United States Court House, 312 North Spring Street, Los Angeles, California, at 1:00 in the afternoon or as soon thereafter as counsel may be heard, defendant Wilfried Van Cauwenberghe appearing specially through undersigned counsel will move this honorable Court to grant the following motion.

MOTION

Defendant Wilfried Van Cauwenberghe by undersigned counsel appearing specially herein respectfully moves for an order pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, vacating the default entered herein against defendant Wilfried Van Cauwenberghe and striking the request therefor. Defendant Van Cauwenberghe further requests that he be awarded his costs, disbursements and reasonable attorneys' fees herein pursuant to Rule 11, Fed. R. Civ. P., 28 U.S.C. § 1927, and this Court's inherent authority. This motion is based upon the accompanying Memorandum of Points and Authorities and Declaration of John G. Kester filed therewith, and the entire record in this case. A form of order is submitted herewith.

* * * *

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

The Request Should Be Stricken and the Default Vacated.

The Request To Enter Default is frivolous and should be stricken. Any default entered should be vacated pursuant to Rule 55(c), Fed. R. Civ. P., because a timely response to the amended complaint was filed.

The declaration accompanying the Request to Enter Default states (correctly) that the alleged service of the summons and amended complaint on Mr. Van Cauwenberghe occurred on February 5, 1986. As is well known, the Federal Rules of Civil Procedure provide in Rule 12 (a) that a defendant shall answer or move "within 20 days after the service of the summons and complaint upon him." The summons explicitly states the same thing.

Nevertheless, the declaration filed against plaintiff, after stating in paragraph 4 that

> "On February 5, 1986 Van Cauwenberghe was personally served . . ."

goes on to assert in the very next paragraph that

> "Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Van Cauwenberghe had until February 18, 1986, to answer, move or otherwise respond to the complaint."

In other words, the Request To Enter Default is based on the assertion that this defendant had only 13 days to respond to the complaint.

We do not believe it is necessary to cite further authority than Rule 12(a) itself to demonstrate that plaintiff's demand lacks any legal or factual support whatsoever. The Federal Rules provide 20 days to respond to a complaint, not 13 days. The point is so obvious that it would be surprising if any case has found occasion to reiterate it. Plaintiff's Request To Enter Default should be denied or, more appropriately, stricken, and any default entered because of it vacated.[3]

* * * *

DECLARATION OF JOHN G. KESTER

I, JOHN G. KESTER, declare as follows:

1. I am counsel appearing specially *pro hac vice* for defendant Wilfried Van Cauwenberghe.

2. I caused a response to the amended complaint herein to be timely lodged with the Clerk on February 25, 1986. A true and correct copy is attached as Exhibit A. I also caused a copy of that response to be served that same day by mail on Percy Anderson, Esquire, counsel for plaintiff.

3. During the week of March 24, 1986 I requested an attorney in Los Angeles to have a paralegal go to the court house for a routine check of the docket sheet in this case.

4. On the afternoon of Friday, March 28, 1986, I was informed that the docket sheet showed that on February 27, 1986 plaintiff had filed a request to enter a

[3] Defendant did respond to the amended complaint within the 20-day period, on February 25, 1986. That motion is currently pending.

default against my client, and that on February 27, 1986 a default had been entered by the Clerk. I asked that a copy of the request and entry of default be obtained immediately from the Clerk's file.

5. On April 1, 1986, I received from my attorney friend in Los Angeles a copy of the Request To Enter Default and Declaration of Percy Anderson that had been filed herein on February 27, 1986. I had never received a copy of these from plaintiff's counsel or been notified of their existence.

6. The entry of default referred to in the docket sheet could not be located in the file.

7. I immediately set about preparing an appropriate response, which was researched, completed and is being sent to Los Angeles for filing on this date.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed at Washington, D.C., this 2d day of April, 1986.

/s/ John G. Kester
JOHN G. KESTER

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

PLAINTIFF ROGER BIARD'S OPPOSITION TO DEFENDANT VAN CAUWENBERGHE'S MOTION TO STRIKE REQUEST TO ENTER DEFAULT AND REQUEST FOR SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF PERCY ANDERSON; AND EXHIBITS

[Filed Apr. 14, 1986]

Plaintiff Roger Biard hereby files his opposition to defendant Wilfried Van Cauwenberghe's Motion to Strike Request to Enter Default and Request for Sanctions.

Respectfully submitted,

BRYAN, CAVE, MCPHEETERS
& MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

By /s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

ARGUMENT

The Default by Clerk was entered in this action under Rule 55(a) of the Federal Rules of Civil Procedure and Local Rule 14.10. A judgment by default has not been requested. Therefore, the rules which govern the setting aside of the entry of default are set forth in Rule 55(c) of the Federal Rules of Civil Procedure.[3] *Madsen v. A. J. Bumb*, 419 F.2d 4 (9th Cir. 1969).

Rule 55(c) provides in pertinent part: "For *good cause shown* the court may set aside an entry of default . . ." Rule 55(c) of the Federal Rules of Civil Procedure. [Emphasis added]. The provisions of Rule 60(b) of the Federal Rules of Civil Procedure concerning the setting aside of the entry of judgments by default do not control in these circumstances. Rule 60(b) of the Federal Rules of Civil Procedure.

Whether an entry of default shall be set aside rests in the sound discretion of the trial court. *Madsen v. A. J. Bumb, supra, Aviation Specialties, Inc. v. Thompson*, 395 F.2d 199 (9th Cir. 1968). The exercise of the court's discretion in determining good cause rests upon two criteria in this Circuit. The party seeking to set aside the default must establish a good reason for its request and must allege the existence of a meritorious defense. *Madsen v. A. J. Bumb, supra*, 419 F.2d at 6; *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F. Supp. 495 (N.D. Cal. 1980).

Applying the above-stated criteria, it is clear that defendant is not entitled to have the entry of default set aside.

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[3] Although defendant has styled this a motion to strike, he concedes that the motion is governed by Rule 55(c) of the Federal Rules of Civil Procedure.

The events which led to the entry of defendant's default do not establish that plaintiff acted improperly or unreasonably. However, the events do establish that defendant failed to timely file a responsive pleading with this Court. Moreover, the entry of defendant's default was not because of the error contained in the declaration supporting the Request to Enter Default, but because of defendant's failure to file a responsive pleading within the required twenty days. Exhibit A in defendant's moving papers shows a filing date of February 27, 1986, twenty-two days after defendant had been served with the first amended summons and complaint.

While defendant seeks to blame the entry of the default on plaintiff, his own carelessness in filing his responsive pleadings is the reason the default was entered. Defendant seemingly wishes to ignore the fact that it was his present counsel who denied representing him the day he was served with the first amended complaint and who failed to respond to plaintiff's inquiries after the entry of the default. Although plaintiff should have forwarded a copy of the Request to Enter Default to defendant's counsel when the motion to dismiss was received, plaintiff's counsel erroneously expected that defendant's counsel would have the courtesy to respond to our inquiries.[4] It is almost as though defendant was, intentionally or unintentionally, creating an atmosphere for the confusion that resulted.

Now, defendant in an apparent disregard of Rule 55(c) of the Federal Rules of Civil Procedure has failed to set forth any reason for his tardy filing. Nor has he set forth any facts from which it could be concluded that he has a meritorious defense to plaintiff's complaint. Under Rule 55(c) defendant must not only set forth good cause for setting aside the entry of default, but he

[4] A copy of the Request to Enter Default was forwarded to the defendant in care of his probation officer.

must also show a meritorious defense. *Marsden v. A. J. Bump*, 419 F.2d 4 (9th Cir. 1969).

The showing of a meritorious defense must be more than a conclusory statement that a meritorious defense exists. The defendant must allege specific facts which, if established at trial, would constitute a complete defense to plaintiff's claim. *United States v. $55,518.05 in United States Currency*, 728 F.2d 192 (3rd Cir. 1984); *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970) (attorney statement that defendant had a good defense to plaintiff claim held insufficient to establish a meritorious defense); *Marsden v. A. J. Bump, supra*, (no evidence of defendant's contention that he had a meritorious defense).

Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense. *Cross v. Fong Eu*, 430 F. Supp. 1036 (D.C.Cal. 1977). In this case the defendant has acted promptly, but has failed to allege a meritorious defense. The only claim asserted by defendant is that he is immune from civil process, but that is not a defense that alleges specific facts, which if established at trial, would constitute a complete defense to plaintiff's claim on the merits. Moreover, for the reasons set forth in plaintiff's opposition to defendant's motion to dismiss the complaint the claim is absurd.

The reason for the omission of a meritorious defense by defendant is obviously the lack of such a defense. Defendant was convicted in *United States v. Van Cauwenberghe, et al.*, CR 84-963 (C.D.Cal. January 22, 1986) (Hauk, J.), of essentially the same claims that are alleged in plaintiff's complaint. In this case, the defendant's prior criminal conviction on the alleged predicate offenses will exert a collateral estoppel effect on the issue of "racketeering activity" pled in the civil RICO count alleged in the complaint. *See Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 644 (D.Ala. 1982) ("under traditional theories of collateral

estoppel, Hitachi's pleas of guilty to the mail and wire fraud counts estop it from denying that it engaged in a pattern of racketeering activity"); *Montana v. United States*, 440 U.S. 147, 153 (1978) (issues determined by a court are conclusive in a subsequent action involving a party to the first litigation even though the later suit is based on different causes of action); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978).

If the Court is inclined to relieve the defendant from his default, plaintiff would urge the Court as a condition to setting aside the default that it require defendant to set forth facts constituting a meritorious defense. *See Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corporation*, 383 F.2d 249 (4th Cir. 1967).

1. *Defendant's Request for Costs And Attorneys' Fees Should Be Denied*

Defendant's request for costs and attorneys' fees is inappropriate and ill-advised. For the reasons set forth in plaintiff's opposition to defendant's motion to dismiss, plaintiff opposes the awarding of costs and attorneys' fees. Plaintiff hereby incorporates by reference its opposition to defendant's request for attorneys' fees contained in Plaintiff's Opposition to Defendant's Motion to Dismiss. The request is meritless and does not warrant further discussion.

* * * *

DECLARATION OF PERCY ANDERSON

I, Percy Anderson, declare as follows:

1. I am an attorney licensed to practice before this Court and am associated with the law firm of Bryan, Cave, McPheeters & McRoberts, attorneys of record for plaintiff Roger Biard in this action and, as such, I am familiar with the facts and proceedings relevant to a determination of the defendant's motion to dismiss.

2. The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

3. On November 12, 1985, the verified complaint and an Ex Parte Writ of Attachment in this action were filed in this Court. An original summons and a photocopy of the original summons were issued for each named defendant by a deputy to the Clerk of the Court for the Central District of California. The original summons was signed by the deputy clerk and was then impressed with the Seal of this Court. Each photocopy of the summons bore a stamped printed impression of the deputy clerk's name and a circle containing the word "SEAL" where the actual Seal of the Court had been impressed on the original summons.

4. The Writ of Attachment sought to attach stock certificates belonging to Wilfried Van Cauwenberghe, one of three defendants in a criminal action entitled *United States vs. Van Cauwenberghe, et al.*, CR 84-963 (C.D.Cal January 22, 1986) (Hauk, J.). A hearing on the Writ of Attachment was noticed for 2:00 p.m. On that same day, I appeared in the coutroom of the Honorable A. Andrew Hauk to notify defendant Van Cauwenberghe and his attorneys of record, John G. Kester and Ronald S. Litt, of the filing of the action and of the application for the Writ of Attachment. Mr. Kester told me that he was not authorized to appear on behalf of Mr. Van Cuwenberghe in any civil proceedings.

5. Despite Mr. Kester's representation, he along with the attorney representing defendant Gerald L. Bilton appeared at the hearing to contest the issuance of the Writ of Attachment. Prior to beginning the hearing Mr. Kester was given a copy of the complaint and the application for Writ of Attachment. At the conclusion of the hearing, United States Magistrate Joseph Reichmann issued the Writ of Attachment. At Mr. Kester's request, the Court then scheduled a hearing to set aside the Writ of Attachment on Friday, November 15, 1985, at 9:00 a.m. Prior to or after the hearing, I asked each counsel representing defendants Van Cauwenberghe, Bilton and Blair if they would accept service of the complaint on behalf of their respective clients. Each refused to accept service of the complaint.

6. Prior to the scheduled hearing to set aside the Writ of Attachment, Mr. Kester advised both the court and our office that he had taken the hearing off calendar and was not representing the defendant in the civil proceedings.

7. On November 24, 1985, the first amended complaint was filed with this court. Service of the first amended complaint was not attempted during the course of the criminal trial because of case authority questioning the validity of serving a defendant during a compelled appearance in a judicial proceeding. A decision was made to await the conclusion of the criminal proceedings to effectuate service on all of the criminal defendants.

8. On January 10, 1986, I received an Order to Show Cause Re: Lack of Diversity of Citizenship issued by the Honorable Pamela A. Rymer, United States District Judge. I immediately telephoned the Clerk to Judge Rymer, Ms. Sheryl Ritchey and explained to her that I believed the Order was issued in error since the first amended complaint was not founded on diversity jurisdiction. Ms. Ritchey agreed with me that the Order was

probably issued in error and that the court probably had intended to issue an Order to Show Cause concerning the several pendent claims alleged in the complaint. Ms. Ritchey advised me not to file a response to the Order to Show Cause and that she would forward a new Order to Show Cause concerning the pendent claims. Prior to receiving such an Order to Show Cause, this action was transferred to this Court.

9. On January 22, 1986, following a jury verdict of guilty, defendant was sentenced to a term of imprisonment by the Honorable A. Andrew Hauk. As part of the court's judgment, the defendant was placed on probation for five years provided he make restitution in the total sum of $34,501.26 to plaintiff Roger Biard. The defendant was also ordered to remain in the United States during the term of his probation. A true and correct copy of Van Cauwenberghe's Judgment and Probation/Commitment Order is attached as Exhibit C.

10. On January 23, 1986, the Honorable A. Andrew Hauk issued an Order transferring the Abamar and Batimar stock certificates to the joint custody of the attorneys for defendant Van Cauwenberghe and the attorneys for the United States in order that the certificates might be sold to effectuate the court's restitution order. To date, plaintiff has not received any sums toward restitution from defendant Van Cauwenberghe.

11. On January 29, 1986, an original and photocopies of an Alias Summons on First Amended Complaint in the action entitled *Biard v. Alan H. Blair, et al.*, CV 85-7378 PAR (JRx) were issued. The original summons was signed by a deputy to the Clerk of this Court, Ms. Janice Woods, the Supervisor of the civil section. The original summons was impressed with the Seal of this Court. The photocopy of the original summons bore a stamped printed impression of Ms. Wood's name and a stamped impression of a circle with the word "SEAL" where the actual seal of the Court had been impressed on the origi-

nal summons. The Declaration of Janice Woods will be filed with this Court.

12. On February 5, 1986, defendant Van Cauwenberghe was served with a copy of the alias summons on first amended complaint and first amended complaint. On that same day, I spoke with Mr. Kester by telephone and advised him of our intention to seek an additional Writ of Attachment. Mr. Kester again told me that he was not authorized to represent Mr. Van Cauwenberghe in any civil proceedings. However, a letter was delivered to Magistrate Reichmann on behalf of Mr. Van Cauwenberghe by local counsel for Mr. Kester, stating that no appearance would be made at the hearing, but objecting to the issuance of the Writ.

13. On February 6, 1986, plaintiff Roger Biard applied to this Court for an additional Writ of Attachment to prevent the dissipation of any excess proceeds realized from the sale of the Abamar and Batimar stock certificates. United States Magistrate Joseph Reichmann issued the additional Writ of Attachment.

14. On February 26, 1986, twenty-one days after service of the Summons and First Amended Complaint on defendant Wilfried Van Cauwenberghe, a Request to Enter Default was lodged with this Court. A copy of the Request to Enter Default was mailed to the last known address for the defendant. The Declaration in support of the Request to Enter Default mistakenly indicated that defendant had until February 18, 1986 to respond to the complaint. It should have read that defendant had until Februry 25, 1986 to respond to the complaint. However, defendant was given the full twenty days in which to respond to the First Amended Complaint before the Request to Enter Default was lodged with this Court. True and correct copies of the Request to Enter Default of Defendant Wilfried Van Cauwenberghe and Default By Clerk are attached as Exhibit B.

15. On or about February 28, 1986, I received a copy of a Motion to Dismiss the Complaint by defendant Wilfried Van Cauwenberghe. The copy of the defendant's motion to dismiss bore no filing date. On or about March 3, 1986, I received a conformed copy of the Default by Clerk showing that defendant Van Cauwenberghe's default had been entered on February 27, 1986. I immediately called the Clerk of this Court and it was agreed that I should attempt to telephone Mr. Kester to discuss the matter. On that same day, I called Mr. Kester and left a message for him to return my call. During the next week, I again telephoned Mr. Kester and left a message for him to return my call. I did not receive a return call from Mr. Kester.

16. On about March 31, 1986, I again telephoned the Clerk of this Court and informed her that I had been unable to reach Mr. Kester. On that same day I telephoned his office at least twice and on each occasion left a message for him to return my call. That afternoon Mr. Kester returned my call and advised me that he had filed a motion to set aside the default.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 1986 at Los Angeles, California.

/s/ Percy Anderson
PERCY ANDERSON

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. CR 84-863-AAH

Defendant WILFRIED VAN CAUWENBERGHE
WITH COUNSEL John Kester

PLEA NOT GUILTY

JUDGMENT AND PROBATION
COMMITMENT ORDER

January 22, 1986

There being * * * a verdict of GUILTY, on counts 1 & 2 Defendant has been convicted as charged of the offense(s) of interstate transportation of a victim of fraud; aiding and abetting; causing an act to be done in violation of Title 18 USC 2314 and 18 USC 2 as charged in count 1 and wire fraud; aiding and abetting; causing an act to be done in violation of 18 USC 1343 as charged in count 2. The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day and the defendant shall become eligible for parole pursuant to Title 18 U.S.C. 4205(a) upon serving one-third of the sentence of imprisonment herein imposed and the defendant shall pay a fine to the United States in the sum of $10,000.00 on count 1 of the indictment.

IT IS ORDERED that the defendant be given credit for time served of three hundred seventy-three (373) days.

IT IS ORDERED that on count 2 the defendant shall pay a fine to the United States in the sum of $1,000.00

and the imposition of the sentence of imprisonment only is hereby suspended and the defendant is placed on probation for a period of five (5) years to commence upon his release from confinement and on the following terms and conditions: 1—that he obey all local, state and federal laws; 2—that he comply with the rules and regulations of the probation office and General Order No. 225; 3—that he make restitution in the total sum of $492,875.15 of which $34,501.26 shall be paid to Roger Biard and $458,373.89 shall be paid to Roger Vandenstock; 4—that the fines and restitution herein imposed shall be paid in such amounts and on such terms and conditions as the probation office may impose having due regard for the defendant's income, employment status and family expenses; 5—that the defendant shall not participate in any way in any ventures or deals in land and real estate, excluding the liquidation of any property to pay the restitution and fines herein imposed, and that he not participate in any wire transfers of money or any other assets except to his family and that the probation office shall approve any such transfers and the defendant not engage in any money laundering; 6—that the defendant shall not leave the United States until restitution is paid; said sentence on count 2 shall run consecutive to count 1 as to the fine and concurrent as to imprisonment and suspended sentence.

IT IS ORDERED that the defendant, whose address is: 30 Avenue Edouard Lacomble, Etterbeek 1040 Brussels, Belgium, pay a total fine to the United States of America in the sum of $11,000.00 . . .

* * * *

/s/ A. Andrew Hauk
A. ANDREW HAUK

Date 1-22-86

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Apr. 14, 1986]

PLAINTIFF ROGER BIARD'S OPPOSITION TO DEFENDANT VAN CAUWENBERGHE'S MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF PERCY ANDERSON AND SHERYL RITCHEY IN SUPPORT THEREOF AND EXHIBITS

I

INTRODUCTION

On November 12, 1985, plaintiff Roger Biard, instituted this Racketeer Influenced and Corrupt Organizations proceeding in this Court following the return of an Indictment by a Federal Grand Jury in the Central District of California charging defendants Wilfried Van Cauwenberghe ("defendant"), Alan H. Blair and Gerald L. Bilton with conspiracy, wire fraud, and interstate transportation of stolen property in violation of Title 18, United States Code, Sections 371, 1343, and 2314. *See United States v. Van Cauwenberghe, et al.*, CR 84-963 (C.D.Cal. January 22, 1986) (Hauk, J.). A true and correct copy of the Indictment is attached hereto as Ex-

hibit A. The Indictment charged the defendants with obtaining over $3 million by fraud from two Belgian nationals, including $1 mlilion from plaintiff Biard. The fraudulent scheme alleged in the Indictment involved the purported development of a condominium project in Overland Park, Kansas, in which the defendants falsely claimed to have an ownership interest.

Defendant Van Cauwenberghe, also a Belgian national, was arrested in Geneva, Switzerland. Subsequently, defendant was extradited to the United States pursuant to Article XII of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. Several assets belonging to defendant were also seized and forwarded to this country including two stock certificates representing his shares of stock in two Panamanian companies. Abamar and Batimar. The stock has a market value of approximately $700,000. On November 12, 1985, over defendant's objection, United States Magistrate Joseph Reichmann issued a Writ of Attachment attaching the Abamar and Batimar stock certificates.[1]

On January 22, 1986, following a jury verdict of guilty on all counts, defendant was sentenced by the Honorable A. Andrew Hauk to a term of imprisonment of one (1) year and one (1) day, the defendant to become eligible for parole pursuant to Title 18, United States Code, Section 4205(a) upon serving one-third of the sentence of imprisonment. The defendant was also ordered to pay a fine to the United States in the sum of $10,000 on Count One of the Indictment. In addition, the defendant was placed on probation for five years on Count Two provided he make restitution in the total sum of $492,875.15 of which $34,501.26 was to be paid to Roger Biard and

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[1] At the hearing for the issuance of the Writ of Attachment, a copy of the complaint was provided to defendant's present counsel.

$458,373.89 was to be paid to Roger Vandenstock, another Belgian victim of the defendant's criminal enterprise. The defendant was also ordered not to leave the United States during the term of his probation. A true and correct copy of the Judgment and Probation/Commitment Order is attached hereto as Exhibit B.

On February 5, 1986, defendant was served with the summons and complaint in the instant matter. At the time defendant was served with the summons and complaint in the instant matter, he was on probation having received credit for 373 days of time served.

On February 6, 1986, United States Magistrate Joseph Reichmann issued another Writ of Attachment for the excess proceeds following a court ordered sale of the Abamar and Batimar stock certificates.[2]

On February 26, 1986, defendant having failed to file a responsive pleading to the complaint, a request to enter defendant's default was lodged with this Court.[3] On February 27, 1986, the clerk entered the defendant's default. Defendant then filed a motion to dismiss the instant complaint. Thereafter, defendant filed a motion to strike the request to enter default. A response to defendant's motion to strike is filed concurrently under separate cover. A hearing on the motions has been scheduled for April 28, 1986, at 10:00 a.m.

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[2] On January 23, 1986, the Honorable A. Andrew Hauk issued an Order transferring the Abamar and Batimar stock certificates to the joint custody of the attorneys for defendant and the attorneys for the government in order that the stock certificates might be sold to effectuate the Court's restitution order. A true and correct copy of the Court's Order is attached hereto as Exhibit C.

[3] On each occasion in which the plaintiff sought a Writ of Attachment, defendant's counsel, Williams and Connolly, was contacted and in each instance indicated they were not representing defendant in the civil proceedings.

II

THE PRESENT MOTIONS

By the present motions, defendant seeks to (1) dismiss the complaint based on a lack of subject matter jurisdiction; (2) to dismiss the complaint because jurisdiction over this defendant is lacking; (3) to dismiss the complaint based on *forum non conveniens*; (4) to dismiss the complaint on the grounds that process was insufficient; and (5) to dismiss the complaint because service of process was insufficient. Defendant also seeks costs and attorneys' fees.

The procedural history of this litigation and the defendant's prior contacts with this jurisdiction are so misleadingly and erroneously portrayed by defendant in his motion to dismiss that if the procedural history and defendant's contacts with this jurisdiction were as defendant states, one would well have to wonder how the defendant was extradited and convicted in this district. The motion to dismiss filed by the defendant is either disingenuous or it demonstrates defendant's complete misunderstanding of the law and the circumstances underlying plaintiff's request for relief. The motion to dismiss is nothing more than an exercise in offuscation [*sic*]. The fact is that the defendant is well aware that this action is the only viable means presently available to plaintiff to recover its losses from the defendants.

Stripped of its misleading rhetoric, it is clear that the sole basis for defendant's motion is his recent unhappiness with the determination made by the jury in the criminal proceedings, and his desire to avoid the civil consequences of his criminal conviction.

For the reasons set forth below, defendant's various motions should be denied in their entirety.

III

DEFENDANT'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION IS WITHOUT MERIT AND SHOULD BE DENIED

Defendant urges this Court to dismiss the complaint in this case because this court lacks subject matter jurisdiction. Defendant contends that to maintain the present action, plaintiff is required to be a United States citizen or a citizen of a different state from all defendants. But the lone authority relied upon by defendant for this novel proposition, an Order to Show Cause issued by another Court in this District, was withdrawn. The Declaration of Percy Anderson (the "Anderson Declaration") demonstrates that plaintiff was relieved from responding to the Order to Show Cause since the complaint did not allege diversity of citizenship as a basis of the court's jurisdiction.

Rule 8(f) of the Federal Rules of Civil Procedure provides in pertinent part:

> Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

In testing the sufficiency of a complaint, the court is required to construe the allegations broadly and liberally in conformity with the principle set forth in Rule 8(f). *Cameron v. Fogarty*, 705 F.2d 676 (2d Cir. 1983); *Loge v. United States*, 662 F.2d 1268 (8th Cir.), *cert. denied*, 102 S. Ct. 2009 (1981).

The complaint herein states a cause of action under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, —— U.S. ——, 105 S.Ct. 3292 (1985). The civil provisions of the Racketeer Influenced and Corrupt Organizations Act provide for a treble damage remedy plus attorneys' fees for persons injured by reason of a violation of the statute. The statute prohibits any person from using a "pattern" of specified criminal acts to invest in, acquire, maintain, or conduct an "enterprise." 18 U.S.C. § 1964 *et seq.*

In *Sedima*, a Belgian corporation entered into a joint venture with respondent Imrex Co. to provide aircraft-related electronic components to the Belgian firm. The buyer was to order parts through Sedima. Imrex was to obtain the parts in the United States and ship them to Europe. The agreement called for Sedima and Imrex to split the net proceeds. Sedima placed more than $8,000,000 in orders, but Sedima became convinced that Imrex was inflating its share of the proceeds by falsifying purchase orders, invoices and credit memoranda. Thereafter, Sedima filed suit in the federal district court in New York. The complaint alleged various common law causes of action including three counts of alleged RICO violations, 18 U.S.C. § 1962(c). The trial court dismissed the complaint on the basis that there was a failure to allege a RICO-type injury. The Second Circuit Court of Appeals then affirmed the trial court's dismissal.

Justice Byron R. White, writing for a 5-4 majority, reversed the Second Circuit's far-reaching decision holding that civil RICO claims must be founded on the defendants' prior convictions of predicate criminal offenses and that only persons with a special RICO-type injury may bring claims under the statute.

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach see *United States v. Turkette*, 452 U.S. 576, 586-587, 101 S.Ct. 2524, 2530-2531, 69 L.Ed.2d 246 (1981), but also of its express admonition that RICO is to "be literally construed to effectuate its remedial purposes," Pub.L. 9-452, § 904 (a), 84 Stat. 947. 105 S.Ct. at 3286.

In light of *Sedima* and common sense, defendant's jurisdictional arguments must fail. First, the statute's

remedial purposes are nowhere more evident than in its application to this case. The legislative history supports the view that RICO was intended to reach the very type of organized criminal activity engaged in by this defendant.[4] Second, it is axiomatic that RICO does not require a plaintiff to be able to allege diversity jurisdiction, nor does it prohibit actions among aliens. Thus, the failure to require diversity of citizenship in a RICO action or to limit RICO actions among American citizens should be addressed by defendant to Congress, not plaintiff. Accordingly, defendant has failed to meet his burden of establishing a lack of subject matter jurisdiction.

IV

DEFENDANT WAS NOT IMMUNE TO CIVIL PROCESS BECAUSE OF HIS EXTRADITION AND THUS HIS MOTION IS GROUNDLESS AND SHOULD BE DENIED

Defendant was extradited from Switzerland pursuant to Article XII of the Treaty of Extradition between the United States and Switzerland, 31 Stat. 1928, T.S. No. 354. He contends that because he was extradited to the United States, he is immune from civil process. Specificially, defendant argues the "rule of speciality" precludes this Court from assuming jurisdiction in this case. This argument is frivolous.

* * * *

[4] Defendant's claim that this action has little or nothing to do with the United States is patently absurd. As demonstrated by plaintiff's declaration filed in connection with the application for the issuance of the Writ of Attachment, a significant portion of the fraudulent activity perpetrated by this defendant took place in this district. A true and correct copy of the plaintiff's declaration is attached hereto as Exhibit D.

V

DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE IS GROUNDLESS AND SHOULD BE DENIED

Defendant offers his third motion to dismiss on the hopeful but dubious ground that the action is improperly venued in the Central District of California. But movant misstates the applicable law and mischaracterizes the complaint.

* * * *

1. *Venue is Proper in this District*

The test for proper venue under 28 U.S.C. § 1391 is clearly defined. Under § 1391(d) "an alien may be sued in any district." As defendant must concede he is an alien. An alien may be sued in any judicial district in which he is found, *Totalplan Corp. of America v. Lure Camera Limited*, 613 F. Supp. 451 (W.D.N.Y. 1985), since an alien can never be a resident of any judicial district. *Williams v. United States*, 704 F.2d 1222 (11th Cir. 1983); *DuRoure v. Alvord*, 120 F.Supp. 166 (S.D. N.Y. 1954). Thus, the venue statute affords no protection to an alien defendant. *Garzon v. United States*, 605 F. Supp. 738 (S.D. Fla. 1985). Thus, venue against this defendant is proper in this district under 28 U.S.C. § 1391(d).

* * * *

2. *This Action Should Not Be Dismissed For Forum Non Conveniens*

The consideration of a motion for *forum non conveniens* is left to the sound discretion of the trial judge and must necessarily depend on the particular facts of each case. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947). In the seminal case of *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947), the Supreme Court, in granting a *forum non conveniens* motion, set forth the factors to be considered in determining whether to grant such

a motion. The relevant factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process over unwilling witnesses; (3) the relative advantages and obstacles to a fair trial; and (4) practical problems that make trial of a case easy, expeditious and inexpensive. There are also public interest considerations, including the administrative burden on a forum which has minimal contact with the controversy, the necessity of the application of foreign law by such forum and the interest which another forum may have in the controversy. *Id.* at 508-09.

As the court in *Gulf Oil* cautioned, the plaintiff's choice of forum should not be disturbed, "unless the balance is strongly in favor of the defendant." 330 U.S. at 508.

An alternative formulation to the standard for determining whether an action should be dismissed on the ground of *forum non conveniens* was approved by the Ninth Circuit in *Paper Operations Consultants Int'l., Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975):

> there must be a clear showing of facts which either (1) establish such oppression and vexation of a defendant to be out of all proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

In applying the above-standard, the Court weighed the factors enumerated in *Gulf Oil*. The Court stressed that the two tests were not mutually exclusive, but the *Gulf Oil* factors are balanced against a presumption in favor of the plaintiff's choice of forum. Thus, the Ninth Circuit view appears to be in harmony with the balancing test applied in the *Gulf Oil* case.

Even a cursory examination of the foregoing interests as applied to the facts involved here establishes that the

Central District of California is a convenient forum; and that the equities require a denial of the defendant's motion to dismiss for *forum non conveniens*.

A. *Relevant Facts*

1. Another RICO action against the same defendants and arising out of a similar fraudulent scheme is currently pending in the Central District of California: *Brassiere* [*sic*] *Belle-Vue v. Blair, et al.*, No. CV 86-1719 JSL.

* * * *

Although California may not be the most convenient forum for the defendant, that is not the test. Defendant cannot show that, on balance, the Central District is so inconvenient that this Court should refuse to retain this action, especially where the chosen forum has substantial contacts with the dispute.

Plaintiff respectfully requests this Court deny defendant's motion and allow plaintiff to proceed with this action in this forum; in the only forum in which all issues and all defendants can be properly joined; and in the forum which is the most appropriate under the balance of convenience test for the adjudication of this dispute.

VI

PROCESS WAS SUFFICIENT

Defendant has moved to dismiss the complaint because he was served with a photocopy of the summons bearing the stamped printed impression of the deputy clerk's name and a stamped impression of the Seal of this Court (a circle with the word seal printed inside). This motion is clearly frivolous.

* * * *

VII

SERVICE OF PROCESS WAS PROPER

Defendant contends that the complaint should be dismissed because he was not served for approximately two and one half months in violation of the Federal Rules of Civil Procedure. This claim too is totally without merit, and moreover, misstates the applicable law and mischaracterizes the relevant facts.

* * * *

By filing this clearly frivolous motion to dismiss defendant is attempting to assure that this controversy will not be adjudicated. Defendant has failed to allege any prejudice that he has suffered as a result of the delay in serving him with the complaint. Moreover, as the Anderson Declaration demonstrates defendant was on notice of the action at the time of its original filing. In addition, all counsel for the criminal defendants had refused to accept service of the complaint and had questioned the validity of any service while the defendants were appearing in the criminal proceedings. Plaintiff, partially in response to the concerns raised by the criminal defendants, thereby waited until the criminal proceedings had concluded. Defendant created the very problem of which he now complains. This motion is not well taken and should be denied.

* * * *

VIII

PLAINTIFF SHOULD BE AWARDED HIS COSTS AND ATTORNEYS' FEES

Incredulously, despite defendant having suffered a criminal conviction for the very acts complained of in the complaint, he maintains that this action was filed in bad faith. Defendant seeks his costs and attorneys' fees.

Defendant's suggestion that he should be awarded sanctions because plaintiff is seeking compensation in addi-

tion to the restitution ordered by the court is inconsistent with the legislative history of Rule 11.[9] Rule 11 of the Federal Rules of Civil Procedure is to be applied with caution to insure that plaintiffs are not deterred from suing to enforce their rights, especially when enforcement of those rights vindicates the Constitution or, as here, acts of Congress. *See Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699, 700 (S.D.N.Y. 1983).

* * * *

DECLARATION OF PERCY ANDERSON

I, Percy Anderson, declare as follows:

* * * *

[Paragraphs 1 through 15 are identical to paragraphs 1 through 15 of Anderson Declaration at pp. 129-133, *supra.*]

16. On March 18, 1986, a complaint allegeing a Racketeer Influenced Corrupt Organizations violation was filed on behalf of Brasserie Belle-Vue, S.A. against the same defendants in this action. The matter was assigned to the Honorable William Matthew Byrne, Jr. The action was filed on behalf of Roger Vandenstock, another victim, who testified against the defendant during his criminal trial.

17. On March 28, 1986, the Brasserie Belle-Vue action was transferred pursuant to General Order 224 of this Court to the Honorable J. Spencer Letts.

18. On or about March 31, 1986, I again telephoned the Clerk of this Court and informed her that I had been unable to reach Mr. Kester. On that same day I telephoned his office at least twice and on each occasion left

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[9] Defendant's contention is also inconsistent with the liberal construction that is to be accorded RICO to achieve its remedial purpose. *See Sedima, S.P.R.L. v. Imrex Co, Inc.*, —— U.S. ——, 105 S.Ct. 2392 (1985).

a message for him to return my call. That afternoon Mr. Kester returned my call and advised me that he had filed a motion to set aside the default.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 1986, at Los Angeles, California.

/s/ Percy Anderson
PERCY ANDERSON

DECLARATION OF SHERYL RITCHEY

I, Sheryl Ritchey, declare as follows:

1. I am the Clerk to the Honorable Pamela A. Rymer, United States District Court Judge.

2. The matters set forth are personally known to me, and if called as a witness, I could and would testify competently thereto.

3. On or about January 7, 1986, I caused to be served by United States mail an Order to Show Cause Re: Lack of Diversity of Citizenship on plaintiff's counsel in the action entitled *Biard v. Blair, et al.*, Case No. CV 85-7378 PAR, issued by United States District Judge Pamela A. Rymer. It is the practice of Judge Rymer to issue such orders in cases based on diversity of citizenship when it appears to the Court from the face of the complaint that diversity of citizenship is lacking.

4. On or about January 10, 1986, I received a telephone call from Percy Anderson, attorney of record for plaintiff in the above-entitled action. Mr. Anderson told me that he had received the Order to Show Cause Re: Lack of Diversity of Citizenship. He questioned whether the Order had been erroneously issued since the complaint did not allege jurisdiction based on diversity of citizenship. Upon examination of the file, I determined that the case did not allege jurisdiction based on diversity of citizen, but alleged jurisdiction under the Racketeer Influenced and Corrupt Organizations Act. I concluded that the court probably had intended to send an Order requiring plaintiff to show cause why several pendent state claims should be maintained in the federal action. It is the practice of Judge Rymer to send such an Order to Show Cause in cases where pendent state claims are alleged.

5. I told Mr. Anderson that he need not reply to Order to Show Cause Re: Lack of Diversity of Citizenship

and that I would forward to him an Order to Show Cause concerning the pendent claims alleged in the complaint.

6. Prior to sending Mr. Anderson the new Order to Show Cause, this action was transferred to the Honorable J. Spencer Letts.

I declare that the foregoing is true and correct under penalty of perjury.

DATED: This 11th day of April, 1986.

/s/ Sheryl Ritchey
SHERYL RITCHEY

EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 84-963-AAH

UNITED STATES

v.

ALAN H. BLAIR, *et al.*,
Defendants.

[Filed Jan. 23, 1986]

ORDER

In accordance with the sentence of this Court that defendant Van Cauwenberghe pay a fine and restitution, and to assist prompt payment thereof, it is by the Court hereby ordered as follows:

1. Counsel for defendant Van Cauwenberghe, subject to the oversight of counsel for the United States, shall promptly seek to sell or otherwise liquidate all assets currently held in the registry of the Court that were transmitted to the Court pursuant to the extradition of defendant Van Cauwenberghe from Switzerland. Negotiations for the sale or liquidation of such assets shall be subject to the advance approval and full monitoring of counsel for the United States.

2. Closing of a sale or other liquidation of said assets up to the amounts ordered to be paid by the Court shall be monitored by counsel for the United States and is subject to approval by counsel for the United States. If such approval is not given promptly when requested, the proposed sale or liquidation may be submitted to the Court for approval.

3. In order that the sentence of this Court and the terms of this order may be carried out promptly, the Clerk of this Court is hereby directed to deliver forthwith all assets and accompanying materials hereinabove referred to and currently in the registry of this Court to the joint custody of John D. Arterberry, counsel for the United States, and John G. Kester, counsel for defendant Van Cauwenberghe.

4. Upon sale or other liquidation of the aforesaid assets, counsel for defendant Van Cauwenberghe shall transmit to the Clerk of this Court for deposit in the registry of this Court the amount realized from such sale or liquidation, in cash or cash equivalents. All sums so transmitted up to the amount of restitution ordered shall be retained in the registry by the Clerk until final disposition of appellate review of this case.

SO ORDERED this 23d day of January, 1986.

/s/ A. Andrew Hauk
Senior United States District Judge

The undersigned jointly submit the foregoing proposed order and request approval by the court.

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Counsel for the United States

1-23-86

/s/ John G. Kester
JOHN G. KESTER
Counsel for Defendant Van Cauwenberghe

1-23-86

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Apr. 14, 1986]

DECLARATION OF JANICE C. WOODS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

I, Janice C. Woods, declare as follows:

1. I am a Deputy Clerk to the Clerk of the Court for the Central District of California and have been employed in the office for the past sixteen (16) years. I am currently one of the Supervisors in the Civil Section of the Clerk's Office.

2. The matters set forth are personally known to me, and if called as a witness, I could and would competently testify thereto.

3. On January 29, 1986, I issued an original and photocopies of an Alias Summons on First Amended Complaint in the action entitled *Biard v. Alan H. Blair, et al.*, CV 85-7378 PAR (JRx). When issuing a summons, it is the practice of the Clerk's Office in the Central District of California to issue an original summons and a photocopy of the original summons for each named defendant.

4. In the *Biard* action, I personally signed the original summons and embossed on the original the Seal of the Court. As is my customary practice and in accordance with Rule 4(d) of the Federal Rules of Civil Procedure,

I used a rubber stamp to place my name on the photocopy of the summons and a seal stamp to place a circle with the word "SEAL" on the photocopied summons.

5. It is customary practice in the Central District of California that the photocopied summons is used for service and the original filed with the court with proof of service attached.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 14th day of April, 1986.

/s/ Janice C. Woods
JANICE C. WOODS

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Apr. 22, 1986]

REPLY IN SUPPORT OF MOTIONS TO STRIKE REQUEST TO ENTER DEFAULT AND TO SET ASIDE DEFAULT AND FOR SANCTIONS; DECLARATION OF JOHN G. KESTER

Plaintiffs' opposition to the motion to set aside default is an imposition both on defendant and on this Court. It should never have been filed.

I.

The facts are very simple. Defendant's response to the complaint was due on February 25, 1986, twenty days after service. Rule 12(a), Fed. R. Civ. P. Defendant's response was, accordingly, served on plaintiff and lodged with the Clerk on February 25, 1986.

There can be no dispute about any of these facts. A copy of the page, date-stamped "LODGED FEB 25, 1986" by the Clerk was an exhibit in our original papers, and for convenience is again attached hereto as an exhibit to the accompanying declaration. A copy of the proof of service on February 25, 1986 is also attached.[1]

[1] Rule 12(a) requires a defendant "to serve" the response, Rule 5(b) authorizes service by mail, and Rule 5(d) requires filing also with the court. All these provisions were fully complied with. "Service by mail is complete upon mailing." Fed. R. Civ. P. 5(b); *Pacific Maritime Ass'n* v. *Quinn*, 465 F.2d 108, 109 n.1 (9th Cir. 1972); *Dillingham Corp.* v. *Hawk*, 97 F.R.D. 450, 451 (D. Haw. 1983); *cf. Beckstrom* v. *Coastwise Line*, 13 F.R.D. 480, 482 (D. Alaska 1953). "Papers and pleadings including the original complaint are considered filed when they are placed in the possession of the clerk of the court." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1153 (1969) (footnote omitted). "The lodging

What, then, is the plaintiff talking about? When plaintiff's counsel telephoned three weeks ago, the undersigned assumed at first that the call was to apologize for having improperly obtained a default when a timely response had been served, and to offer to correct the error. Nothing of the kind, however. Plaintiff's counsel simply informed the undersigned (more than a month after the event)[2] that the case was in default, and that if defendant did not like the situation, defendant could file a motion and plaintiff would respond. See attached declaration, ¶ 7. Counsel for defendant prepared and filed a motion to set aside the default.

Plaintiff now has filed a 41-page document *opposing* the vacation of the default, including a 10-page memorandum and 31 pages of mostly irrelevant exhibits. That opposition, amazingly, asks this Court to leave in place a default that was entered at plaintiff's direction with no basis whatsoever for his having done so.

In all that massive filing, plaintiff manages somehow to avoid mentioning the only two facts that matter:

1. The response was due February 25, 1986.
2. The response was served and also was received by the Clerk on February 25, 1986.

The default which plaintiff irresponsibly obtained never should have been entered, and should be vacated forthwith.[3]

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of a petition with the clerk to be 'filed' by him is a 'filing'." *United States* v. *Missco Homestead Ass'n*, 185 F.2d 283, 285 (8th Cir. 1950); *accord*, *Milton* v. *United States*, 105 F.2d 253, 255 (5th Cir. 1939).

[2] Plaintiff concedes that "plaintiff should have forwarded a copy of the Request to Enter Default to defendant's counsel . . . ." Pl. Opp. at 6.

[3] Plaintiff's argument that defendant is now obliged to present a defense and has not done so is bizarre. In the first place, defendant has submitted several defenses in the pending motion to dismiss. In the second place, plaintiff seems to be arguing that by

II.

It is troubling enough that plaintiff opposed the correction of his own error. Even more troubling, however, is the fact that plaintiff's document makes misstatements to the Court that are inexcusably misleading, and factual assertions that plaintiff well knows are incorrect. Why plaintiff has done this, we can only speculate.

Plaintiff very well knows that defendant's response was served February 25, 1985. Plaintiff has the service copy with proof of service attached.[4] A date-stamped copy is in the record. Yet plaintiff's opposition asserts to this Court:

> "The response to the first amended complaint was not timely filed . . . ." Pl. Opp. at 4;

and

> "On February 27, 1986, the clerk entered the defendant's default. Defendant *then* filed a motion to dismiss the instant complaint." Pl. Opp. at 5 (emphasis supplied);

and

> "Contrary to defendant's assertion that he filed a timely appearance, the Exhibit attached to his moving papers shows that he filed his motion to dismiss

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improperly obtaining a default, a plaintiff can force upon a defendant some additional burden before the mistake can be set aside. Defendant obviously has shown all the "good cause" required by Rule 55(c), Fed. R. Civ. P., which provides simply that "For good cause shown the court may set aside an entry of default . . . ."

[4] Again in an inexplicable statement to the Court, the Declaration of plaintiff's counsel states that "the copy of defendant's motion to dismiss bore no filing date." Anderson Declaration at ¶ 15. In the first place, of course, it did not have to. See Rule 5(d), Fed. R. Civ. P. But in fact the motion *was* dated in at least five places "February 25, 1986," and also was accompanied by the proof of service attesting to service on that date.

on February 27, 1986, two days beyond the required filing period . . . ." Pl. Opp. at 4 n.2;

and

"defendant failed to timely file a responsive pleading with this Court." Pl. Opp. at 6;

and

"his [defendant's] tardy filing . . . ." Pl. Opp. at 7;

and

"defendant having failed to file a responsive pleading to the complaint within the required twenty (20) days . . . ." Pl. Opp. at 3.

Those statements are false, obviously not inadvertent, and appear designed for no other purpose than to mislead the Court. Nowhere does plaintiff acknowledge, as plaintiff well knows, that defendant fully complied with Rule 12(a) by serving a response on February 25, 1986, and also submitting a copy received by the Clerk on that day.

What plaintiff has done here—first, in filing an inaccurate declaration to improperly obtain the default, and then in leaving that declaration uncorrected and making further incorrect statements to try to prevent the default's being set aside—is not the way that litigants are expected to conduct themselves. "The duty of candor is a necessary corollary of the certification required by Rule 11." *Golden Eagle Distributing Corp.* v. *Burroughs Corp.*, 103 F.R.D. 124, 127 (N.D. Cal. 1984).[5] Sanctions are called for when papers filed are not well grounded either in fact, *Domingues* v. *Figel*, 626 F. Supp. 368, 373-74 (N.D. Ind. 1986), or in law, *Jorgenson* v. *County of Volusia*, 625 F. Supp. 1543, 1547-49 (M.D. Fla. 1986). Plaintiff's papers fail on both counts.

Plaintiff's counsel might have forthrightly come forward and acknowledged an error and corrected it. In-

[5] "The most elemental rationale of this branch of Rule 11 is that fair decisions cannot be expected if the deciding tribunal is not fully informed, let alone if it is misled." 103 F.R.D. at 128.

stead, he has left his patently incorrect declaration of February 26, 1986 on the record and forced defendant to prepare and file first a motion and now this response—to respond to an opposition paper which has the effrontery even to accuse defendant—with absolutely no basis whatsoever—of "carelessness in filing his responsive pleadings." Besides that, plaintiff also has forced this Court to waste its time.

If Rule 11 has any function at all, it is to deal with misconduct of this sort.

* * * *

CONCLUSION

For the reasons stated herein and in our opening memorandum, the request for default should be stricken, the default should be vacated, and defendant should be awarded his costs and attorney's fees in connection with this motion, plus any other sanctions this Court may deem appropriate.[11]

* * * *

[11] Sanctions both should "compensate the wronged party for the extra effort it was forced to expend," and in addition "should deter similar conduct in the future." *Perkinson* v. *Houlihan's/D.C., Inc.*, 108 F.R.D. 667, 676 (D.D.C. 1985). Attorneys' fees awarded are based on normal charges. *Cf. American Security Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056, 1057 (D.C. Cir. 1986). It is also appropriate to direct the offending party in addition to make a payment to the Clerk of the Court in recognition of the Court's wasted time. *Dominguez* v. *Figel*, 626 F. Supp. 368, 374 (N.D. Ind. 1986); *Olga's Kitchen of Hayward, Inc.* v. *Papo*, 108 F.R.D. 695, 700 (E.D. Mich. 1985). Additional sanctions may also be appropriate. *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1178, 1180 (D.C. Cir. 1985).

DECLARATION OF JOHN G. KESTER

[Filed April 22, 1986]

JOHN G. KESTER declares as follows:

1. I am an attorney appearing specially *pro hac vice* for defendant Wilfried Van Cauwenberghe and can testify competently to the matters contained herein.

2. Defendant's motion papers referred to in paragraph 15 of the Declaration of Percy Anderson, Esquire, dated April 14, 1986 and filed herein (consisting of 16 numbered paragraphs), were accompanied by an affidavit of service showing service by mail on February 25, 1986. On information and belief, this fact was and is well known to Mr. Anderson, although he does not mention it in his Declaration. A copy of the declaration of service is attached hereto, as is a copy of the cover page of the Motion to Dismiss showing that it was received by the Clerk on February 25, 1986.

3. Mr. Anderson's statement in paragraph 15 of his declaration that defendant's Motion to Dismiss which he received bore no filing date is incorrect. It was in fact dated February 25, 1986 on its face, and accompanied by a proof of service of the same date.

4. I have no record of receiving any telephone message from Mr. Anderson on March 3, 1986. It is possible that he left a message which I did not receive, as I had a succession of temporary secretaries during the month of March 1986 and was away from the office for several days during that month, and did not receive all my messages. I do have a record that Mr. Anderson called my office on March 11, 1986, a day when I was out of town. He left no message. I have no record that he ever called me on any other occasion until we spoke on April 2, 1986. I believe it improbable that if he called on other days all the call notations would have failed to reach me.

5. I have never received any written correspondence from Mr. Anderson other than the papers that he filed with the Court on April 14, 1986, which I received on April 18, 1986.

6. Prior to mid-February 1986 I told Mr. Anderson that I did not represent defendant Van Cauwenberghe in this case. That statement was completely accurate at that time. At that time there had not even been any attempt to serve Mr. Van Cauwenberghe. I did not agree to represent Mr. Van Cauwenberghe in any aspect of this matter until the latter part of February, 1986, and applied for a special appearance *pro hac vice* with the Court on February 25, 1986.

7. I spoke by telephone with Mr. Anderson on April 2, 1986 (not "on or about March 31, 1986" as he asserts in paragraph 16 of his Declaration). He informed me at that time that a default had been entered at his request. I asked him whether he had received defendant's Motion to Dismiss that was served and submitted to the Clerk on February 25, 1986. He acknowledged that he had. I asked him what he intended to do about the default that had been erroneously entered. He told me that I should file a motion and that he would respond to it. I informed him that I had just learned of the default being entered and had prepared a motion to have it set it aside. He told me that he did not intend to do anything about the default and did not intend to respond to defendant's motion to dismiss until and unless the default was set aside.

8. Mr. Anderson has never made any inquiry of me about anything, other than to ask (1) in November 1985 whether I would accept service of the complaint (I declined); (2) in early February 1986 whether I represented Mr. Van Cauwenberghe in this proceeding (I accurately stated I did not at that time); and (3) on April 2, 1986 to seek more time to respond to the Motion to

Dismiss filed five weeks previously (I declined in light of the two months he had been provided).

9. Defendant Van Cauwenberghe has numerous meritorious defenses to the amended complaint, several of which are set forth in the pending motion to dismiss.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Washington, D.C. this 21st day of April, 1986.

/s/ John G. Kester
JOHN G. KESTER

DECLARATION OF JOHN G. KESTER

[Filed April 22, 1986]

JOHN G. KESTER declares as follows:

1. I am an attorney appearing specially *pro hac vice* for defendant Wilfried Van Cauwenberghe and can testify competently to the matters contained herein.

2. The trial of a criminal proceeding involving the same plaintiff and defendants with the plaintiff herein testifying as a witness, *United States* v. *Blair, et al.*, No. CR 84-963-AAH, U.S. D.C., C.D. Cal., began on November 19, 1985 and concluded on December 17, 1985. The principal fact witnesses who testified at the trial, and their places of residence, are listed below:

Roger Biard	Brussels, Belgium
Roger Vanden Stock	Brussels, Belgium
Claude Henriod	Geneva, Switzerland

The additional fact witnesses who testified at the trial, and their places of residence, are listed below:

Jerold Bressel	Kansas City, Missouri
Charles Solomon	Los Angeles, California
Robert Rothenberg	Los Angeles, California
Michael Schultz	New York, New York
Ernest Piaget	Brussels, Belgium
Abbe Emmanuel de Meester de Heyndonck	Brussels, Belgium
Emmanuel de Sutter	Brussels, Belgium
John Largent	Brussels, Belgium
Inspector Marcel Timmermans	Brussels, Belgium

In addition, Glenn Martin, an FBI agent from Honolulu, Hawaii, was called as an expert witness. The Court also issued letters rogatory to obtain the testimony of Jacques Haelterman, a resident of Brussels, Belgium.

3. The great bulk of the testimony at the trial was from Messrs. Biard, Vanden Stock, and Henriod. The testimony of Mr. Rothenberg and Mr. Solomon, the only two Los Angeles witnesses, did not have to do with defendant Van Cauwenberghe at all. Both witnesses testified in their capacity as bank officers, and either had ever met Van Cauwenberghe. The issues at the trial turned principally on credibility of the foreign witnesses. Mr. Schultz had never met Mr. Van Cauwenberghe, either. Mr. Bressel testified that he had written to Mr. Van Cauwenberghe.

4. Messrs. Piaget, de Sutter, Largent, Inspector Timmermans, and the Abbe de Meester de Heyndonck, were all character witnesses for defendant Van Cauwenberghe who traveled from Brussels to Los Angeles at their own expense in order to testify for him.

5. If the present case ever were brought to trial, I would expect the witnesses listed in paragraph 3, *supra*, to be called. In addition, defendant would seek to obtain the testimony of the following persons whose actions were described at the trial and who, because they are aliens outside the jurisdiction of the United States, would not be subject to subpoena:

Witness	Residence	Nature of Testimony
Charles Berden	Brussels, Belgium	Negotiated contract alleged to be fraudulent
Constant Vanden Stock	Brussels, Belgium	Approved contract complained of; alleged victim of fraud
Mme. Constant Vanden Stock	Brussels, Belgium	Acting president of company allegedly defrauded at time of relevant events

Witness	Residence	Nature of Testimony
Philppe Collin	Brussels, Belgium	Cousin of complaining witness; met with plaintiff; gave statements exculpatory of defendant to FBI
Jacques Haelterman	Brussels, Belgium	Participated in similar negotiations and can testify to *bona fides*
Ludovic Verbist	Brussels, Belgium	Participated in negotiations
Jean-Claude Dugrandpraz	Geneva, Switzerland	Trust officer who participated in negotiations
Eric Staehli	Geneva, Switzerland	Trust officer who participated in negotiations
H. Knuttl	Lugano, Switzerland	Trust officer who participated in negotiations
John Eardley	Geneva, Switzerland	Custodian of relevant exculpatory documents not available in United States
Monique Mat	London, England	Submitted affidavit attesting that money defendant received was repayment of a preexisting loan

Defendant would not plan to call any witnesses from the United States, and I would not expect plaintiff to call any other than those already listed in paragraph 2, *supra*.

6. In addition, defendant would call as character witnesses the following individuals who, because they are aliens outside the jurisdiction of the United States, are not subject to subpoena. These persons have submitted letters to the Court attesting to Mr. Van Cauwenberghe's good reputation and good character and to his record of thirty years of honest dealing as a real estate broker in Brussels. They have stated that they desire to testify on defendant's behalf but are not financially or otherwise able to travel to the United States to testify. (Defendant is not financially able to pay their transportation costs, and has recently been granted leave by the U.S. Court of

Appeals for the Ninth Circuit to proceed *in forma pauperis* in his appeal.)

Witness	Residence
R. Cambron	Tubize, Belgium
Professor Georges Lambinon	Brussels, Belgium
Dr. J. P. Goldschmidt-Clermont	Brussels, Belgium
F. Stroobants	Brussels, Belgium
Mme. Gilberte Degeorge	Brussels, Belgium
Mlle. Anne-Marie Castermans	Brussels, Belgium
Raymond de Cuester	Brussels, Belgium
Notaire Jacques Delcroix	Brussels, Belgium
Notaire Prosper Hourdeau	Wavre, Belgium
Guy F. A. Coenaes	Brussels, Belgium
Leon Van Audenhage	Duisburg-Tervuren, Belgium
Inj. Henri Bister	Brussels, Belgium
R. Philips	Brussels, Belgium
Professor Frederic Pousset	Brussels, Belgium

7. Most of the Belgian persons listed in paragraphs 5 and 6, *supra*, do not speak English.

8. Many of the documents in this case that pertain to defendant are in the French language and from the files of Fides, a Swiss trust company. Acts occurring in Belgium are governed by Belgian law, and in Switzerland by Swiss law.

9. References hereinafter to the declaration of Percy Anderson are to his declaration dated April 14, 1986, consisting of 18 numbered paragraphs, and attached to plaintiff's opposition to the Motion to Dismiss filed herein.

10. Mr. Anderson's declaration is inaccurate in a number of respects, including the following:

a. Contrary to paragraph 5 of Mr. Anderson's declaration, the undersigned did not appear on behalf of defendant for purposes of a writ of attachment proceeding before the magistrate on November 12, 1985. Undersigned counsel so stated on the record to the magistrate, who so acknowledged. Undersigned counsel was present at the specific direction of the Court in the criminal proceeding previously referred to, No. CR 84-963-AAH, and was present only in the capacity of counsel in the criminal proceeding, as was the attorney for the United States. Counsel had been directed by the Court in the criminal proceeding (Honorable A. Andrew Hauk) to attend solely in connection with a motion under Rule 41(e) of the Federal Rules of Criminal Procedure for return of property improperly seized which was pending in the criminal proceeding.

b. Mr. Anderson's statement in paragraph 15 of his declaration that the Motion to Dismiss filed by defendant herein bore no filing date is incorrect. In fact the motion was dated on its face February 25, 1986, and was accompanied by a proof of service bearing the same date.

c. Mr. Anderson's statement in paragraph 9 of his declaration that defendant was ordered to remain in the United States during the term of his probation is incorrect. Defendant was ordered to remain only until the restitution ordered by the Court was paid. That verdict and sentence are currently on appeal. No. 86-5028, U.S. Court of Appeals, Ninth Circuit.

d. I have no record of any telephone call by Mr. Anderson to my office on March 3, 1986. The only telephone call by him to my office during the month of March, 1986 of which I am aware occurred on March 11, 1986, during an absence by me of several days from the office. To the

best of my knowledge, he did not telephone again until April 2, 1986.

e. Contrary to paragraph 18 of Mr. Anderson's declaration, our telephone conversation which he dates at "on or about March 31, 1986" occurred April 2, 1986.

f. Contrary to paragraph 18 of Mr. Anderson's declaration, I did not advise him in our conversation of April 2, 1986 that I had filed a motion to set aside the default. I told him that I had prepared one for filing. At the time we spoke, it had not yet been filed, and it was in fact not filed and served until after Mr. Anderson had declined to take any action to set aside the default he had improperly obtained.

11. Mr. Anderson's declaration and accompanying papers are incomplete in a number of respects, including the following:

a. Plaintiff's memorandum in opposition to the motion to dismiss states at page 29 as an excuse for late service that "all counsel for the criminal defendants . . . had questioned the validity of any service while the defendants were appearing in the criminal proceedings." That assertion is incorrect. Counsel for defendant Van Cauwenberghe never discussed the matter with Mr. Anderson and never made any such statement (although we were of course aware of the immunity that did and does exist).

b. When Mr. Anderson spoke with me by telephone on February 5, 1986, in the conversation referred to in paragraph 12 of his declaration, he never mentioned to me the purported service of a civil complaint on Mr. Van Cauwenberghe that day, and I was unaware of it until several days later.

12. Defendant Wilfried Van Cauwenberghe lawfully departed from California in early February, 1986, and has stated that he has no intention of ever returning there. He is under no current legal obligation to do so.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Washington, D.C. this 21st day of April, 1986.

/s/ John G. Kester
JOHN G. KESTER

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed April 24, 1986]

NOTICE OF FILING

Notice is hereby given of the filing, as an exhibit to the Reply in Support of Motion to Dismiss filed herein, of the attached new decision of the United States District Court for the District of Massachusetts, Honorable Robert E. Keeton, J., in the case of *Gardner, et al.* v. *Troesch, et al.*, Civ. No. 84-2116-K. This opinion, attached at Tab 1, is not yet reported in the *Federal Supplement.*

Also filed herewith as exhibits are additional portions of the transcript in *United States* v. *Blair, et al.*, No. CR 84-963-AAH, that have recently been provided by the court reporter. These are at tabs as follows:

Tab 2—Re availability of suit in Belgium.

Tab 3—Re documents and witnesses not available in United States.

Tab 4—Re language problems.

Tab 5—Re evidentiary showing.

WILLIAMS & CONNOLLY

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April 24, 1986

[Transcript of Proceedings, *United States* v. *Blair, et al.*, No. 84-963 AAH (U.S.D.C., C.D. Cal.)]

EXHIBIT 2

[Testimony of Roger Biard]

[Cross-examination]

[1452] Q Mr. Biard, isn't that why your bank statements from the National Bank of Georgia weren't sent to you in Brussels, but were sent to the main office to Julie Daniels?

A Well, Julie Daniels was an employee of the bank and she was in charge of my account.

Q And, as we saw on the exhibits, the reason your bank statements were sent to the main office of the bank instead of to you in Brussels was so the Belgian tax authorities wouldn't know about this account?

A Certainly not.

Q Isn't that the reason? Mr. Biard, isn't that one of the reasons why you didn't make any criminal or civil complaint in this case in Belgium so that the tax authorities wouldn't find out about your bank account in Georgia?

A No. No. Certainly not.

Q And—

A The action had to be taken here in the States. It was reported here and something had to be done in Switzerland, as well, because the money went through Swiss accounts.

Q Is it your testimony that you couldn't bring any kind of a proceeding against Mr. Van Cauwenberghe in Belgium?

[1453] A I could have done that.

Q As a matter of fact—

A But I didn't think it was necessary. In fact, I thought it was useless, frankly, and that is all.

* * * *

[Testimony of Roger Vanden Stock]

[Cross-examination]

* * * *

[1415] THE COURT: If you needed a personal lawyer, you went to the lawyer for the brewery?

THE WITNESS: I do not remember that I needed a lawyer for myself.

THE COURT: You never needed a lawyer?

THE WITNESS: For myself?

THE COURT: Yes.

THE WITNESS: No. I cannot remember that—well, yes. The last time my lawyer was Spreutels.

THE COURT: Who?

THE WITNESS: Spreutels.

THE COURT: Spreutels.

THE COURT: He is also the lawyer for the brewery.

THE WITNESS: He is the lawyer for the brewery.

BY MR. TWITTY:

Q In 1980, did you tell either one of the brewery lawyers that you were interested in buying Concorde Bridge?

A No.

Q If you had talked to them about it, the brewery would have paid for it, wouldn't it?

A Yes. I think so.

Q You never have told anybody in an official governmental capacity in Belgium about any of this [1416] Concorde Bridge Project, have you?

A The houses in Concorde Bridge, no.

Q And to put it another way, when you decided to complain about it, you went to Switzerland, right?

A Yes.

Q And when you decided to complain about it, you went to the United States; right?

A Yes. Yes. The complaint was in Switzerland. Yes.

Q You complained in Switzerland and you ultimately complained to the authorities and representatives of the United States; right?

A Yes.

Q You knew all the time that Wilfried Van Cauwenberghe was and still is a Belgian; didn't you?

A Yes.

Q And during all that time, Wilfried Van Cauwenberghe was and is a member of that soccer club that your daddy owns; isn't he?

A That is not as easy as that. No.

Q Wilfried Van Cauwenberghe had a box at the soccer club, didn't he?

A No. Not a box. He had a special ticket.

Q He had a special ticket?

A A special season ticket. Yes.

* * * *

[8-1644] BY MR. KESTER:

Q Last week, Mr. Vanden Stock, you told the jury about your lawyer in Brussels, Mr. Spreutels; isn't that right?

A Yes.

Q And Mr. Spreutels also represents Roger Biard; doesn't he?

A Yes.

Q You have a lawyer in Geneva, also, don't you, Mr. Vanden Stock, Mr. Eardley?

A Yes?

Q And Mr. Eardley also represents Roger Biard?

A That's right.

* * * *

[8-1675] Q Thank you. Now, that letter also mentions that Mr. Eardley also represents Roger Biard, doesn't it?

A Where?

Q Look at the last paragraph on page 5.

A Oh, yes.

Q You've seen Roger Biard often, haven't you?

A Yes.

* * * *

[8-1676] Q You also saw Mr. Biard in 1983 when you were upset because you thought your Concorde Bridge investment wasn't going very well; isn't that correct?

A Yes.

Q And you testified this morning that you're sharing lawyers with Mr. Biard in three different cities, correct?

A Yes.

Q Are you sharing the costs of those lawyers with Mr. Biard, also?

A We are having a sort of business.

THE REPORTER: I'm sorry?

THE WITNESS: Yes.

BY MR. KESTER:

Q Your answer is yes?

A Yes.

Q Now I'd like to go back to the interview with the F.B.I. that you said took place at the American Embassy in Brussels in June of 1984.

A Yes.

* * * *

[8-1693] Q You didn't bring any criminal complaint against Mr. Van Cauwenberghe in Brussels, did you?

A No.

Q In fact, you never told Mr. Van Cauwenberghe that you thought he owed you money, did you?

A No. I never heard about anything of that.

* * * *

[8-1696] Q Are you aware that Mr. Van Cauwenberghe traveled to Geneva?

A Yes, I know that.

Q In 1984?

A Yes, I know that.

Q You know that? And in 1985?

A I don't understand your question.

Q Mr. Van Cauwenberghe traveled to Geneva in 1985 to meet with your lawyer Mr. Eardley; isn't that correct?

A I didn't know that.

Q You didn't know that. Have you ever filed a civil suit against Wilfried Van Cauwenberghe in Belgium?

A No.

Q Have you ever filed a civil suit against Mr. Van Cauwenberghe in Switzerland?

A No.

Q Have you ever filed a civil suit against Mr. Van Cauwenberghe in the United States?

A Well, I'm not sure of that. You have to ask—you ask Mr. Corbert (phonetic) [*sic*—Golbert].

Q Mr. who?

A My lawyer here in the United States.

Q You don't know whether you filed a civil suit in the United States?

A I don't think.

* * * *

EXHIBIT 3

[Testimony of Roger Vanden Stock]

[Direct examination]

* * * *

[1173] BY MR. ARTERBERRY:

Q Where was this meeting?

A At Fides.

Q Who was present?

A Phillip Colan [*sic*—Collin], myself. Who was present? My lawyer, Mr. Eardly.

THE COURT: Who is your lawyer?

THE WITNESS: Mr. Eardley, a lawyer in Geneva.

THE COURT: That is your lawyer?

THE WITNESS: Yes.

THE COURT: Who called whom?

THE WITNESS: Myself.

THE COURT: You called him. All right.

THE WITNESS: Yes.

BY MR. ARTERBERRY:

Q Was he present at the meeting?

A Yes.

Q Anyone else?

A Mr. Henriod was there. Mr. Berden was there and one of the assistants of Mr. Eardley, and Mr. Blair came.

* * * *

[Cross-examination]

[1176] Q And now you and Mr. Biard are represented by Mr. Eardley together; correct?

A Yes.

Q With respect to the meeting you testified at Fides, where Mr. Eardley was present, do you remember that?

A Yes.

Q Mr. Blair didn't have a lawyer there; did he?

A No.

* * * *

[1180] A After some time after we—the owner of the company was Mr. Berden when we signed the contract. After a certain time, that company went over to my father.

Q To the family?

A To the family. My father.

Q So, it was either Mr. Berden or your father that gave written instructions to Fides?

A Yes.

Q Let me ask you based upon Mr. Berden's position with the family business, wouldn't he have the copies of the documents involved?

A All the documents we have, we have given.

Q You haven't given the written contract between the brewery and Fides, have you?

Frankly, you don't know whether it has been given, do you?

THE COURT: Given to what? Fides or whom?

MR. GYORGY: That is a good question.

Q Given to whom, Mr. Vanden Stock?

I will ask the witness whether all the documents in this case were turned over to a Swiss lawyer, Mr. Eardley?

A Yes.

THE COURT: It was given to Mr. Eardley, the document [1181] that Berden signed directing Fides what to do if he did sign it?

THE WITNESS: I don't know that, Your Honor, but we gave all the documents we had to Mr. Eardley.

THE COURT: Eardley. All right.

BY MR. GYORGY:

Q That would have also included the written loan agreement between the brewery and Interfarma; is that correct?

A I think so. Yes.

* * * *

[1387] Phillip Colan [*sic*—Collin] was present during this presentation, too; right?

A Yes.

Q Did you talk to Phillip during that time that Mr. Bilton was talking to you?

A I cannot remember that.

Q Did you have any questions at all of Mr. Bilton about the project?

A I cannot remember those, also.

Q Who was it that told Phillip Colan [*sic*—Collin] that Mr. Blair did not own Concorde Bridge?

A I never heard about that.

Q Mr. Blair told you and Phillip, didn't he, that Prudential Insurance Company owned the houses and the land?

[1388] A Mr. Blair didn't say that to me.

Q If Phillip told the F.B.I. that, then Phillip was mistaken; right?

A Yes.

Q Phillip certainly would not lie about it, would he?

A No.

Q You are aware, aren't you, that Phillip, in fact, told the F.B.I. that when he first came to Los Angeles he thought that Mr. Blair owned the project but after he got here, Blair told him he did not. You know Phillip told the F.B.I. that, don't you?

A Yes. Yes.

Q You do recall that Phillip told him that—told the F.B.I. that?

A Phillip had made a declaration to the F.B.I., but when he spoke about it, Phillip Colan [*sic*—Collin] said to me that the F.B.I. had—that the F.B.I. misunderstood.

Q Phillip actually told you and your father that he knew that Mr. Blair did not own the townhouses, didn't he?

A No. No.

Q Where is Phillip today?

A He is in Brussels.

Q He is still working in the brewery?

[1389] A Yes.

Q He is a director general like you?

A Yes. Yes.

Q Is he sick?

A No.

Q Did you talk to him yesterday or today on the telephone?

A Not today. Not yesterday. Three days ago.

Q You have not talked—you talked to Phillip three days ago and that is the last time you did; right?

A Yes.

Q And he wasn't sick that day?

A No.

Q Is there some reason why Phillip is not here?

MR. ARTERBERRY: Objection, Your Honor. There is no foundation that the witness would know an answer to that question.

* * * *

[8-1653] Q Was Mr. Berden present at the F.B.I. interview of Mr. Collin?

A He made the trip with Mr. Collin, but I don't know if he was present.

Q He made the trip to the United States?

A Yes.

Q To be interviewed by the F.B.I.?

A Yes, because my cousin had a broken leg at that time.

THE COURT: Who's your cousin?

THE WITNESS: Mr. Phillipe Collin.

THE COURT: C O L L I N.

THE WITNESS: Yes.

BY MR. KESTER:

Q Was your father, Constant Vanden Stock, interviewed by the prosecutors or by the F.B.I. in this case?

A I cannot remember that.

Q Do you recall if anyone requested him to give an interview?

A I can't remember that.

Q Did your Swiss attorney, Mr. Eardley, have conversations with the F.B.I. or with the prosecutors in this case?

A Well, I think so, but I'm not sure. I never saw that. I think so.

Q Your best answer, your best recollection is yes; is that correct?

A Yes.

• • • •

[8-1654] Q You testified last week, Mr. Vanden Stock, that all of the family's documents about Concorde Bridge were given to Mr. Eardley; is that correct?

A Yes.

Q All of Interfarma's documents?

A Yes?

[8-1655] Q And Mr. Eardley gave copies of some of those to the F.B.I., didn't he?

A I think he gave everything.

Q He didn't give the F.B.I. the contract for management between Fides and the true owners of Interfarma, though, did he?

A I don't know that.

Q He didn't give the F.B.I. the documents that showed Mr. Berden as the owner of Interfarma for a while, did he?

A I don't know that.

Q He didn't give the F.B.I. the documents that changed the ownership from Mr. Berden to your father, did he?

A I don't know that, also. I cannot give an answer to that.

Q He didn't give the F.B.I. any documents between the brewery and Interfarma, did he?

A What? (Confers with interpreter.) I think he has given all the documents.

• • • •

[8-1661] Q This morning I was asking you about some documents that you gave to Mr. Eardley, the Swiss lawyer. Do you recall that?

A Yes.

Q There was in existence a management contract between Fides and the true owners of Interfarma, wasn't there?

[8-1662] THE COURT: Between Fides and who?

MR. KESTER: Interfarma.

THE COURT: Interfarma? All right.

THE INTERPRETER: Management agreement.

THE WITNESS: (In English:) You saw it, yes.

BY MR. KESTER:

Q That was a trust agreement for the loan?

A Yes. You saw that.

Q I'm speaking, Mr. Vanden Stock, of a management agreement that authorized Fides to manage Interfarma. There is such a document; isn't there?

A I think so, yes.

Q Yes. And there was also someplace a document that showed Mr. Berden to be the owner of Interfarma for a while, right?

A Yes.

Q And there was also a document that changed the ownership from Mr. Berden to your father, right?

A Yes.

Q And you testified last week that Mr. Blair asked you in July 1981 for $200,000.00. Was there a document that showed that?

A No.

Q No document for that?

A No. No.

Q And there was a document authorizing Fides to sign the [8-1663] agreement between Hexagonal Valley and Interfarma for Concorde Bridge; wasn't there?

A Well, I didn't saw that document, but I think it's yes, there is a document.

MR. KESTER: Your Honor, we have not received any of these documents that Mr. Vanden Stock has agreed . . . [exist] this afternoon. May we inquire of Mr. Arterberry whether they were given to him?

THE COURT: To the F.B.I.

MR. KESTER: To the F.B.I. or Mr. Arterberry.

THE COURT: Let's identify the documents: The management contract between Fides and Interfarma, the document which shows that Berden was the owner of Interfarma, the document showing change of ownership from Berden to Vanden Stock's father, and what was the last one?

MR. KESTER: Those three are correct. The last one was a document authorizing Fides to sign the contract between Hexagonal Valley and Interfarma. That's exhibit 24, the contract.

* * * *

[8-1665] BY MR. KESTER:

Q Was that signed by Fides?

A That's Fides.

THE COURT: Who's Fides? Who are these two people?

THE WITNESS: Fides, that's the trusting company we were working with.

THE COURT: I know, but who are these people? "Deuzler"?

THE WITNESS: These are men of Fides.

THE COURT: Who are they? Do you know their names?

THE WITNESS: No.

THE COURT: They work for Fides.

THE WITNESS: Well, they are working for Fides, yes.

BY MR. KESTER:

Q And you testified that they signed that contract on behalf of Interfarma at the direction of Interfarma?

A Yes.

THE COURT: Where's the document that authorized that?

THE WITNESS: I think that Fides had that document.

THE COURT: All right. Now, the question is: Has the government got any of them?

[8-1666] MR. ARTERBERRY: Your Honor, everything the government received has been turned over to the defense.

THE COURT: That doesn't answer the question.

MR. ARTERBERRY: The government did not request every piece of paper in the case.

THE COURT: Do you have these four?

MR. ARTERBERRY: We don't, Your Honor. We—

THE COURT: You don't. All right.

MR. ARTERBERRY: Whatever we have, we've given to the defense.

* * * *

MR. KESTER: Your Honor, I will represent to the court that we did not receive any of those four documents.

THE COURT: Did you look for them in that pile?

MR. KESTER: We looked through every document, Your Honor.

THE COURT: Then the government hasn't got them.

MR. ARTERBERRY: And, Your Honor, as I made clear, the government didn't request every piece of paper what we asked [8-1667] for. What we got—

THE COURT: There's an instruction we give at the end of the case, ladies and gentlemen: If a party fails to produce material documents which are, in your opinion, weighty enough to be produced, have some bearing on the case, and that's up to you, as to the credibility, when they are available to be that party and they could have been obtained, then you must assume that they were unfavorable to that party. So ordered.

MR. ARTERBERRY: Your Honor, may the government observe here that to my knowledge this is the first

such request that either we or the witness have received about these documents. If the defense is asking for them, I'm sure they can be obtained.

THE COURT: Well, that isn't the question. The question is whether you could have gotten them.

MR. ARTERBERRY: Your Honor, this is the first I've been asked to obtain these.

THE COURT: You keep saying that. I said that isn't the question. That question is whether you asked for them.

MR. ARTERBERRY: We have not, Your Honor.

THE COURT: All right. That's enough.

MR. ARTERBERRY: Yes, Your Honor.

THE COURT: What do you want?

MR. KESTER: Your Honor, I would simply like to state that we asked the government to produce everything they had.

* * * *

[Testimony of Claude Henriod]

[Cross-examination]

[2070] Q The Court is asking you to look for—

THE COURT: The paper by which you gave the notice from Interfarma to Swiebel pursuant to the directions of Constant acting for and on behalf of Fionnay, which owned all of Interfarma; Fionnay being the Vanden Stock family's Panamanian dummy corporation.

These are your files, aren't they, Mr. Henriod?

THE WITNESS: Copies of documents which were in our files.

THE COURT: In your files. You are familiar with them?

THE WITNESS: Yes.

MR. KESTER. If it might assist, we have had testimony that some of Fides' files were given to Mr. Eardley who gave some of those documents to the government. It is possible the government has documents from Mr. Eardley.

THE COURT: I don't know. The government said they gave all those to you.

MR. ARTERBERRY: That is correct, Your Honor.

* * * *

[2071] MR. KESTER: I was suggesting, Your Honor, that he might look also in the files that Mr. Eardley gave to the government to see if Mr. Eardley gave that document.

MR. ARTERBERRY: Agent Beech has looked through those files, Your Honor.

THE WITNESS: I don't find a copy of this letter

* * * *

[2141] MR. ARTERBERRY: Very well, Your Honor.

THE COURT: I think the courts have held that you have to put it in evidence so that it can be cross-examined and confronted and you don't have to say to the witness, "where is that paper that you relied upon," and he says, "it is an F.B.I. report that I relied on in Geneva." "Where is it?" "It is still in Geneva."

Ridiculous.

* * * *

[2164] Q When Fides managed Interfarma, Fides kept a file of documents for Interfarma; is that correct?

A That is correct.

Q And one of the documents in that file was a document in which the owners of Interfarma authorized Fides to handle the management of Interfarma; is that correct?

A Yes. An agreement.

Q There was such a document some place?

A Yes.

Q And there also exists and there was in that file a document which showed that Mr. Berden, for a period of time, had been the owner of Interfarma; is that correct?

A Yes, but not really the owner. We knew that he was acting on behalf of Mr. Constant Vanden Stock.

Q There was a document from that period that shows that that occurred; is that correct?

A That is correct.

Q There also exists some place a document which shows Fionnay, the Panamanian corporation, as the owner of Interfarma; is that correct?

A Yes, it is.

Q And that was in the file at Fides, also?

[2164] A Of course.

Q And there also exists some place a document that directed and authorized Fides to sign the December 1980 agreement between Hexagonal Valley and Interfarma.

A Yes. Of course.

Q That was in the file of Fides, too?

A Yes.

Q And there were other documents in that file as well relating to Fides and Interfarma, correct?

A Yes. A lot of documents.

Q Does Fides today have the complete file of Fides' management of Interfarma?

A No, because in 1983—because of the litigation, in fact, the management of Interfarma was taken over by Mr. Eardley.

Q So there came a time, you say, in 1983, when Fides ceased being the manager of Interfarma?

A That is right.

Q And Interfarma got a new manager?

A That is right.

Q And the new manager [was] brought all the files, right?

A Of course, the file of the company.

Q And the new manager, you said, was Mr. Eardley; is that correct?

A Yes, that is right.

[2165] MR. KESTER: May I have a moment, Your Honor?

THE COURT: All right.

MR. KESTER: I have nothing further for this witness, Your Honor.

Thank you for coming.

* * * *

EXHIBIT 4

[Testimony of Roger Biard]

[Cross-examination]

* * * *

[1365] MR. LITT: Unfortunately, they don't appear to be labeled.

THE COURT: Yes. They say, "Monsieur Roger Biard, Gerard Desseret, Sportlaan N6, 1900," and then something and then it says, "AANSLAG, 1985," so that must be something. I don't know whether it is for the tax year 1985 or for what tax year. AANSLAG must be the year of payment. They all seem to be in order until we get to the last two pages, the last two pages which appear to be the year—tax year 1985.

MR. LITT: That may well be, your Honor, but my only point is having received these approximately 45 minutes ago, I am certainly not in a position to question Mr. Biard about it now, if there are any questions to ask.

* * * *

[1434] A I have to maintain that all my income is in there.

Q I know you have to maintain that, Mr. Biard, but I am asking you what your tax return says.

Is that 16,000,000 francs reported as fixed or variable compensation?

THE COURT: Where are you looking at? Page what?

MR. LITT: The third page headed by Roman number 8 and I am looking opposite number 1 where the first numbers are written at the top of the page.

THE COURT: The question is?

BY MR. LITT:

Q I am asking him if that is what it says, Your Honor.

A Am I supposed to answer?

THE COURT: What does the line say?

THE WITNESS: I don't know enough of Flemish to answer. I am sorry, Your Honor.

BY MR. LITT:

Q Could we get the Flemish interpreter?

THE COURT: Step forward and read it for us. You are an official court interpreter?

[1435] THE INTERPRETER: Yes.

THE COURT: Number 1 and the first word appears to be "BELASTBAAR," B-E-L-A-S—it is hard to read my copy.

THE INTERPRETER: Firm or variable inclusive of the gain and money that has been taken, et cetera, et cetera.

MR. LITT: Could the Court read that back, please?

THE COURT: I am sorry. Read it again. Talk into the microphone.

THE INTERPRETER: I am sorry. Variable salaries.

THE COURT: What?

THE INTERPRETER: Variable.

THE COURT: Firm?

THE INTERPRETER: Or changeable. Variable.

THE COURT: Fixed?

THE INTERPRETER: Fixed or variable salaries inclusive of capital gain and money that has been taken out of it.

BY MR. LITT:

Q That is what appears opposite number 16,000,000; is that right?

A Yes. It is.

Q Mr. Biard, will you put the exhibit back in front of you.

THE COURT: I think it would be easier if the [1436] French interpreter got up and the Flemish interpreter sat down on the chair.

* * * *

[1437] BY MR. LITT:

Q At the very bottom of that page, there is a small box going all the way across the page. Do you see that, Mr. Biard?

A Oui.

THE COURT: The first word is "AANDUIDING." Do you see that, Mr. Biard?

BY MR. LITT:

Q Mr. Biard—

THE COURT: Let's get the interpreter.

MR. LITT: It is below 24.

THE WITNESS: I'd like the Flemish interpreter.

THE COURT: Read it.

THE INTERPRETER: Indication from section 5 through 10—

MR. LITT: Indication.

THE COURT: What did you say?

THE INTERPRETER: Indication for section 5 through 10.

THE COURT: Per the sections 5 through 10?

THE INTERPRETER: Business income exclusive income from Belgium institutions of active—excuse me—moveable active investments in Belgium institutions and then it ends with "or losses," so it is foreign income or losses.

* * * *

[1438] Q Is it an accurate translation of this sentence to say, "Indication per sections 5 through 10 of professional income under numbers 1 through 13 excluding income from personal property invested in Belgium firms or professional losses of foreign origin"?

Is that what it says?

A No. Foreign has to be for both.

Q For both professional income and professional losses?

In other words, Mr. Biard, that asked you to list all of your profit and income from foreign sources; is that correct?

A I don't know. I suppose so. Yes.

Q Is there anything written under there, Mr. Biard?

A The tax expert is talking with the fiscal authorities all the time about my case and other cases, so they must have agreed on some sort of declaration and I can only repeat that all my earnings are there.

Q Mr. Biard, is there anything written in that document that asked you to tell what foreign income you received as part of your professional income?

A Well, if the tax expert didn't put anything in it, I don't know why.

[1439] Perhaps most probably because he knew he had to do it like that.

Q Mr. Biard—

A I can't say more, you know.

Q Mr. Biard, you haven't answered my question, yet.

Would you tell the jury whether or not there is anything in that box?

A Well, 16,000,000, again.

Q No, Mr. Biard.

I am talking about the box where you are supposed to report your professional income from foreign sources. Is there anything written in that little box down at the bottom?

THE COURT: There are three lines down at the bottom. I think that means country and nature and amount; is that correct?

THE INTERPRETER: Yes.

THE COURT: It says—

THE INTERPRETER: Nothing is written there.

THE WITNESS: Yes, well—

BY MR. LITT:

Q It is your testimony that this 16,000,000 includes your foreign income; is that right? The 16,000,000 francs includes your foreign income?

A That includes everything.

* * * *

[1440] Q Let's go to the 1980 return, now, Mr. Biard.

Let's start with the second page of the 1980 return and we have Roman numeral 3 there, income from capital and personal property; is that right?

A Yes.

Q And there are two headings, "A" and "B," one for Belgium income and one for foreign income; is that right?

A Yes.

Q Is there anything written in that spot, Mr. Biard?

A Nothing. It is the same thing as the year before.

Q Let's go over, then, to your professional income section and let's go to the page which has Roman numeral 10 at the top of it.

Do you have that page, Mr. Biard?

A Yes. I have it.

Q And Roman numeral 10 is headed, "Compensation of active partners"; is that right?

A Again, it is the same thing for 17,500,000 this time.

Q Mr. Biard, the problem is the jury doesn't read Flemish. We have to get it translated for them what these headings mean.

If you will just answer the question I am asking, then things will move faster.

THE COURT: He said it isn't in there.

* * * *

[1441] Q Now look at Number 6 under that Roman numeral 10 there, Mr. Biard. Doesn't that say, Mr. Biard, that if you have declared above an income or expenses of foreign origin, please mention it here the relevant country, the heading under which they were listed, and the amount. Isn't that what Number 6 says, Mr. Biard?

A Yes.

Q Is there anything written in there, Mr. Biard? [1442] A No, and my answer is the same one as the other year, the previous year.

Q I am sure it is.

Mr. Biard, look on the previous page, Roman numeral 9.

Do you have that down at the bottom of the page?

A Yes.

Q You see where it says, "name and address of companies." That is what Roman numeral 9 is?

A Yes.

Q It says, "List in this section the names and addresses of the companies who paid you the income declared in parts 8, 10 and/or 11"; is that right?

A Yes.

Q What is the company that you listed under there?

A Mine.

Q That is Biard and Company or it is under its previous name?

A It is the old name.

Q It is your stock brokerage company?

A Yes.

Q It doesn't mention the National Bank of Georgia, does it?

A No.

[1448] Q Mr. Biard, looking again at this 1983 return under this 17,000,000 francs that you reported as your income and benefits from your profession, do you see that number where it asks specifically to identify whether any of that income is from a foreign source? Do you see that?

A Yes. Yes.

Q And nobody told the Belgian tax authorities that any of that 17,000,000 francs came from a foreign source, did they?

A They are certainly well aware of everything.

Q I know you said that several times. We are talking about tax returns, now. On this tax return, nobody told the Belgian tax authorities that one franc out of that

17,000,000 francs came from your bank account in the United States, did they?

A That must have been told in due time.

Q I know you keep saying that, Mr. Biard.

Do you have any documents showing that?

A How could I have documents about that?

Q Precisely. Precisely.

* * * *

[1460] Q You made money in France and Spain, too?

A I have more earnings over there.

Q If you keep adding up more foreign income, you are going to end up having only to claim $4,000 as income in Belgium, right, from your stock brokerage firm?

THE INTERPRETER: That is not a very nice question. I don't see what that means.

BY MR. TWITTY:

Q Are you the liar or is your tax man?

THE INTERPRETER: I have already answered the question.

MR. TWITTY: I agree with you, sir. You sure have.

* * * *

[Redirect examination]

[1494] BY MR. ARTERBERRY:

Q Point it out to His Honor.

THE COURT: Number what? What is it called? Read that off in Flemish.

MR. LITT: Instead of showing it, if he could read it out loud under what it would be helpful.

THE WITNESS: It says $8,000,000.

THE COURT: Under what?

THE WITNESS: Number 4.

THE COURT: That is "TERUGBETAALBARE" I think. Under "B" that would be 8,000,000.

THE WITNESS: We are requested every quarter to make down payments.

* * * *

[1495] BY MR. ARTERBERRY:

Q Point that out to the Court, if you would.
A Number 15. The next part of that page, Number 15, "INGEKOHLERDI SALDI."
THE COURT: Number what?
THE WITNESS: 15.
THE COURT: Is it "TE BETALEN"?

BY MR. ARTERBERRY:

Q Point it out.
THE COURT: Tell us.

BY MR. ARTERBERRY:

Q Is it Number 16?
A It is the end of the statement.
THE COURT: Number 16, isn't it?
THE WITNESS: This is right.
THE COURT: Under 16, it says "TE BETALEN."
THE WITNESS: Yes.
THE COURT: What does that mean?
THE WITNESS: To pay. That means to pay 4,097,998 Belgian francs.
THE COURT: Why does that say to pay that?
[1496] THE WITNESS: Because finally my earnings were more than what I thought and naturally I had to pay for the difference. I didn't give enough down money.
THE COURT: That is for the year 1979; right?
THE WITNESS: Yes.
THE COURT: Why do you have to pay some more if you have already paid it? I don't get it.
THE WITNESS: I didn't pay enough as a down payment so I had to pay 8,000,000 and I had to pay 12,000,000 finally.
THE COURT: Let's get it from the interpreter. What do those words mean in Roman numeral 4? "VOORHEFFINGENEN and VOORAFBETALINGEN"?

THE INTERPRETER: Advanced payments.
THE COURT: What is it for?
THE INTERPRETER: Advanced payments. Assessments and advanced payments.
THE COURT: Then on the left-hand side "NIET" means nothing.
THE INTERPRETER: In combination with the next word it is "not reimbursable."
THE COURT: Not reimbursable.
THE INTERPRETER: Yes. And the other section is reimbursable.
THE COURT: What does that mean? He gets it back?
[1497] THE INTERPRETER: If there is a reason for it.
THE WITNESS: No. No. It is part of my tax payments.
THE COURT: If it is reimbursable, you get it back.
MR. ARTERBERRY: Your Honor, I think the interpreter referred to that as "advanced payments" under item "B"; is that correct?
THE INTERPRETER: Yes.
THE COURT: You said "reimbursable."
THE INTERPRETER: If he has overpaid it then he would be.
THE COURT: Then he gets back what, 8,000,000?
THE INTERPRETER: No. Certainly not. The advanced payments or V.A.—that is an abbreviation, the advanced payments."
THE COURT: "A.V."?
THE INTERPRETER: That means the advanced payments. "VOORHEFFINGENEN" and "VOORAFBETALINGEN."
THE COURT: Yes.

* * * *

[1500] THE COURT: Where is the figure after the deduction?

MR. ARTERBERRY: They do both operations at once.

THE COURT: That is what you say. I want to hear what the interpreter says.

THE INTERPRETER: I am figuring it.

THE COURT: You sound like one of these IRS guys.

MR. ARTERBERRY: Never.

THE COURT: You must have been around them.

Tell us what you are doing. Why do you say it is 12,000,000 francs? Let me ask him: How did you get 12,000,000? It doesn't appear on there.

Oh my God. Maybe Arterberry dreamed it up. Where did you get it?

MR. ARTERBERRY: Your Honor, it is his testimony, not mine.

THE WITNESS: It must be there.

THE COURT: What does "AANSLAG" mean?

THE INTERPRETER: "Assessment," so the 4,000,000 you get by adding the advanced payments.

THE WITNESS: No. No. This and this make the 4,000,000.

THE INTERPRETER: The 4. Yes. If you look at the 3,448,000—

THE COURT: Yes. "AANSLAG."

[1501] THE INTERPRETER: —Plus—

THE WITNESS: Accrued interest.

THE INTERPRETER: That makes up the 4,097,998.

THE COURT: Why does it say down there "INGEKOHLERDE SALDI"? Number 15.

THE INTERPRETER: That is the balance. That is anything that has to be incorporated in that balance.

THE COURT: Incorporated into what? Added to what?

THE INTERPRETER: The 3,000,000 plus the 624,000, so everything is taken into account, these two figures.

THE COURT: If you add 3,000,000 to 8,000,00, you don't get 12,000,000.

THE INTERPRETER: No, but if you add the 8,000,000 to the to be paid $4,000,000, then you get 12,000,000. It is the 8,000,000 of the other half of the page of the advanced assessments.

THE COURT: I thought you said three million. He jumped to 4,000,000.

THE INTERPRETER: The number in 15 in the one column plus the one in the old. That is the additional taxes. It is the 3,000,000 plus the figure that makes up the amount that still has to be paid.

THE COURT: "AANVULLENDE." What does that mean?

THE INTERPRETER: Which one?

THE COURT: "C."

[1502] THE INTERPRETER: That is what I said. "Additional."

THE COURT: What does "GEMEENTE" mean?

THE INTERPRETER: That is the city tax. That is according to the compensation of the city that is the municipality.

THE COURT: According to what?

THE INTERPRETER: According to the municipality or the township.

THE COURT: Sound?

THE INTERPRETER: Township, T-O-W-N. Township.

THE COURT: The city taxes.

Then the total taxes.

THE INTERPRETER: That is the total.

THE COURT: Well, you come then still with 10,825,488, which comes out different.

THE INTERPRETER: That is under 7. That is the basis of the calculation of the taxes.

THE COURT: Then they add six percent?

THE INTERPRETER: Six percent.

THE COURT: For township. That is 649,529. All right. Then you add 10,000,000 plus the 649,000 and

then I guess plus the "AANSLAG," which means additional taxes.

THE INTERPRETER: Plus the Number 15 balance.

THE COURT: 15 comes from 10; right?

[1507] BY MR. ARTERBERRY:

Q What page are you referring the Court to now for the amount of taxes you paid?

A I refer to the third page and that comes from the state. That is the official document.

THE COURT: What does it say on the top?

THE WITNESS: "AANSLAGBILIJET."

THE COURT: What?

THE INTERPRETER: Assessment.

THE COURT: The third page is titled nothing.

THE INTERPRETER: The third page does not have a title. Indeed.

THE COURT: The third page doesn't have a title.

THE INTERPRETER: It does not.

THE COURT: What does it say?

THE INTERPRETER: Joint taxable income. Income of real estate and business income with interest.

THE COURT: This is income. That is not taxes.

THE INTERPRETER: But it said it was a joint taxable income, Your Honor.

THE COURT: I know, but the question was how much taxes did he pay.

* * * *

[1513] THE COURT: "TERUG TE GEVEN."

THE WITNESS: I can see that. I don't know what it is, frankly.

BY MR. ARTERBERRY:

Q You had 3,473,703 Belgian francs refunded?

A Yes. That is the refund. Yes.

Q What about the amount above that, 3,594,267? It says "BELASTING STAAT," 3,594,267. Those are taxes paid?

A "BELASTING STAAT"?

THE INTERPRETER: No. No. That is the government tax. The federal tax.

BY MR. ARTERBERRY:

Q Yes. Federal tax.

THE INTERPRETER: Yes. State tax in Holland.

THE COURT: The township tax?

THE INTERPRETER: No. That is different. State is the federal and the township is actually the locale.

[1514] THE COURT: Six percent. It says "GEMEENTEBELASTING."

THE INTERPRETER: Yes. You are taxed twice, by the state and by the city.

* * * *

BY MR. ARTERBERRY:

Q Could you point that out to his Honor, Mr. Biard, the figure you are referring to on the 1982 sheet?

THE COURT: That should come under a heading "VOORAFBETALINGEN" and "VERMEERDERING," shouldn't it? That means payment in advance, doesn't it, Miss Interpreter?

THE INTERPRETER: That is the 5,000,000, Your Honor. 5,000,000.

THE COURT: Where is it?

THE INTERPRETER: That is 5,500,000.

[1515] THE COURT: I know. 5,000,000 what?

THE INTERPRETER: 5,500,000 in advance payment.

THE COURT: Where do you see that?

THE INTERPRETER: That is under the principle sum and then it goes real estate and then it says real estate advanced payments—advanced—excuse me. Assessment for business and then advanced payments.

THE COURT: I thought advanced payments means that it was sent in. When we had it before it was under the word "TERUGBETAALBARE." Right? We were talking about the tax year 1979.

THE INTERPRETER: Yes.

THE COURT: Where is it over here?

THE INTERPRETER: That is under the—

THE COURT: What is the word?

THE INTERPRETER: "VOORAFBETALINGEN."

THE COURT: What? "VOORAFBETALINGEN"? Is it the first column or the second?

THE INTERPRETER: It is under 3 on the third paragraph and the fourth line, Your Honor.

THE COURT: Third paragraph and the one, two, three, fourth line is "VERSCHIL."

MR. LITT: The other side, Your Honor, on the right.

MR. ARTERBERRY: The right-hand side, Your Honor.

THE COURT: I am looking on the right-hand side if [1516] you count paragraphs as the things above the dotted lines, the fourth line in that paragraph is "VERSCHIL." Do you see it?

MR. LITT: It is the 12th line down from the top on the right. You come to "VOORAFBETALINGEN."

THE COURT: One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and I get "BONIFICATIE."

MR. LITT: Two up from that. Two up from that. "VOORAFBETALINGEN."

THE COURT: "VOORAFBETALINGEN."

MR. LITT: The usual spelling for the court reporter.

THE COURT: We don't see anything in "TERUG TE GEVEN."

THE INTERPRETER: Yes.

THE COURT: "VOORHEFFINGENEN" and "VOORAFBETALINGEN" means advanced payments. You told me that.

THE INTERPRETER: That is to be reimbursed. That was to be paid back to reimbursed. Advanced payment is the "VOORAFBETALINGEN."

THE COURT: What?

THE INTERPRETER: Are you looking at the same line?

THE COURT: In 1979 you said it was $8,000,000 in advanced payments.

MR. ARTERBERRY: 82, Your Honor.

THE COURT: If you look in the 1979 return right above the word "TERU" whatever, you will see "VOORAFBETALINGEN."

[1517] MR. ARTERBERRY: I think the interpreter said before there were two categories of advanced payments, those that were reimbursements and those that were not and that is what the word "TERUGBETAALBARE," or whatever—

THE COURT: This is the advanced payments, but it isn't broken down into—what do you call it—deductible and non—

THE INTERPRETER: Reimbursable, Your Honor.

THE COURT: Reimbursable and nonreimbursable. All right. 5,000,000 in advance. What else?

* * * *

[1518] Q Can you tell us how much you paid in taxes that year in Belgian francs?

THE COURT: Wasn't the refund 3,061,000 and the tax was 2,400,000?

THE WITNESS: No, sir. The refund was 2,400,000.

THE COURT: What does that mean?

THE INTERPRETER: Government. That is government taxes.

THE COURT: The three was the government taxes? "GEMEENTEBELASTING" was 651,627 and you got a refund of 2,410,306.

THE WITNESS: What I have paid.

THE COURT: How much taxes did you pay?
THE WITNESS: 11,000,000.

* * * *

[Testimony of Roger Vanden Stock]

[Direct testimony]

[5-919] THE COURT: Well, you told me it wasn't that.
THE WITNESS: Yes, but I didn't understand you.
THE COURT: Oh brother. Now, once more: Roger, capital V—
THE WITNESS: Capital V and capital S.
THE COURT: V A N D E N, capital S T O C K. All right.

BY MR. ARTERBERRY:

Q Mr. Vandenstock, will you state your full name for the record.
A Vanden Stock, Roger Philemon.
THE COURT: Say that again? Vanden Stock—
THE WITNESS: Roger Philemon.

BY MR. ARTERBERRY:

Q Philemon is your middle name. Would you spell that, please?
A Philemon, P H I L E M O N.
THE COURT: G A—
THE WITNESS: No, no, no. P H.
THE COURT: "B" as in "boy," or "P" as in "Paul"?
THE WITNESS: "P"/Paul, "H" like—
THE COURT: P H—
THE WITNESS: P H I L E M O N.
THE COURT: Philemon.

* * * *

[5-922] Q Who first approached you about this?
A (Confers with interpreter.)

THE COURT: What did you say? I couldn't even understand the interpreter on that one.
THE WITNESS: (Through interpreter:) Do you mean with regard to exporting beer to the United States?

* * * *

[5-926] MR. LITT: Your Honor, could we sort out when he's testifying through the interpreter and when he's testifying by himself? I think the the idea of his having private conversations with the interpreter—
THE COURT: Aren't you testifying just to what he said?
THE INTERPRETER: Yes, Your Honor. He asked to me and asked what he doesn't know; for instance, for a letter.
THE COURT: All right. Objection overruled.
THE INTERPRETER: And just now, he asked for part of a sentence and he needed to know how to say, "He knows lots of people." So that's just what I said.
THE COURT: Well, say the whole thing, will you?
THE INTERPRETER: Well, Mr. Blair tasted the beer and he said that the beer was very good, and he mentioned that he might be of—that he knows other people in the United States and that the beer could be exported to the United States. That is the gist of it, Your Honor.

* * * *

[Cross-examination]

[1268] Q Every single time that you came to the United States in connection with the Concord Bridge matter, Phillip Colan [*sic*—Collin] always came; right?
A Yes.
Q And every time anything was discussed in the United States about Concord Bridge with you, Phillip Colan [*sic*—Collin] was always there; right?
A Yes.
Q Who speaks better English, you or Phillip?
A I speak better.

Q Do you speak English in the same general manner today as you did in 1980 or is it better now than then?

A It is about the same.

Q Are you having any problems at all understanding me?

A Sometimes, yes.

* * * *

[1270] Q Before I get away from it, this Blair purchase as to Concord Bridge, all those conversations you testified about that everybody had, they were all in French. They weren't in English, were they?

A Yes.

Q When you talked to Mr. Blair and when you talked to Mr. Van Cauwenberghe and when you talked to Phillip Colan [*sic*—Collin] and when you talked to everybody and talked to your father and when you talked to the police in Switzerland and when you talked to everybody about it, you talked to them in French; didn't you?

A Yes.

Q And they talked to you in French?

A Yes. They tried to talk to me in French.

Q Mr. Blair understands French well, doesn't he?

A Yes.

Q You never have any trouble understanding what he says to you; right?

A Yes.

* * * *

[1271] Q You read some parts? Did you read those in Los Angeles or in Brussels or some place else?

Let me take that one back and go at it a more direct way.

Where did you read them?

A Where?

I think it was in Brussels, maybe. Well, I don't know. I don't know.

Q It is said that you read English significantly better than you speak it; right?

[1272] A Not significantly because it is a problem. It is a problem of words, so I don't—it is a problem of translating some words. I don't know that.

Q But you do read?

A So when I translate it, I try to--

THE COURT: To guess?

THE WITNESS: To guess what it means.

BY MR. TWITTY:

Q And insofar as your testimony here as been, there have been some things you have been relatively certain of and some things you are not quite so sure of; right?

A That is what I remember. Yes.

* * * *

[8-1626] Q And this letter, exhibit 330, is dated the same day as the meeting you had at Fides; is it not?

A Yes. Yes, that's right.

MR. KESTER: Your Honor, at this time I'd like to offer exhibit 330 and exhibit 330 A, the translation, into evidence.

THE COURT: Any objection?

MR. ARTERBERRY: Your Honor, there's no certification on the translation. The government has no objection, however, to 330, the document itself. We do object to the translation.

THE COURT: Even the witness said he like 330 A better than 330, which I take it means it expressed his intent better than 330.

MR. KESTER: I didn't hear the witness say that, your [8-1627] Honor.

THE COURT: Didn't you say that, that you like 330 A better than 330?

THE WITNESS: No. I prefer 330 because it's in French.

THE COURT: I thought you liked 330 A better.

THE WITNESS: No, no, no. Because it's in French, 330.

MR. KESTER: Your Honor, may we have 330—

THE COURT: I'm going to put them into evidence subject to the government moving to strike any portion of 330 A that you can find from a French interpreter does not correctly interpret 330.

MR. KESTER: Very well, Your Honor. That's perfectly fine with us, Your Honor, if they have any quarrel with the translation.

THE COURT: In evidence, 330 and 330 A.

* * * *

[8-1635] Q That's on page 4 of the *Contrat De Fiducie*; is that right?

A Yes.

Q Exhibit 331.

A Yes.

Q And when they signed that, they were acting with the authority of the Vanden Stock family; is that correct?

A Yes.

MR. KESTER: Your Honor, at this time I would like to offer exhibit 331 into evidence along with exhibit 331 A, which is a translation, and we would offer the translation on the same terms Mr. Arterberry asked for.

THE COURT: Yes, in evidence subject to exhibit 331 A being subject to a motion to strike, or portions of it, if the government is able to show to the satisfaction of the Court that it's not a correct translation.

Now, who'd you say signed *Le Mandat* in the French version, exhibit 331? Who signed it, your aunt?

THE WITNESS: My aunt and my mother.

THE COURT: What's "*Le Mandat*" mean, "*Le Mandat*"?

THE WITNESS: (Through interpreter:) It means the representative in the situation.

* * * *

[8-1718] THE COURT: Where's the letter?

MR. LITT: I'm sorry?

MR. TWITTY: It's in French, Judge. You can have my copy. I can't read it anyways.

* * * *

[8-1758] Q Have you got 38?

A Yes.

Q Read the first paragraph to me.

A From where, "*comme suite*"?

Q Yes. In English.

A (Reads aloud in foreign language.)

Q In English.

A (In English:) I cannot say that in English.

Q Give it a try.

MR. ARTERBERRY: Objection, Your Honor. The interpreter has read this document. If Mr. Twitty want it read again, the interpreter is standing by. This is not a test of the witness at this point.

THE COURT: Oh, yes it is. That's what he's trying to do, is test the witness.

MR. TWITTY: Absolutely.

THE COURT: Objection overruled.

BY MR. TWITTY:

Q Just read it in English for me, please.

* * * *

[Testimony of Claude Henriod]

[Direct examination]

[1919] BY MR. ARTERBERRY:

Q Mr. Henriod, what is your address, sir?

A My address, I live in Geneva, Switzerland.

Q Are you a citizen of Switzerland?

A I am a citizen of Switzerland.

Q What is your native language?

A It is French.

Q As his honor has pointed out to you, we have an interpreter who will be able to assist you today. If at

any time you don't understand the question or you need any assistance, the interpreter is standing by to give you that assistance.

Do you understand that?

A Thank you.

Q Mr. Henriod, are you employed, sir?

A Yes, I am.

Q Where?

A I work for Fides Societe Fiduciare in Geneva.

* * * *

[2044] THE COURT: Yes, but neither one is mentioned in it. What does it say, *Messieurs*?

THE WITNESS: "I refer to Addendum A dated October 12, 1981. I also refer to the agreement you signed on December 18, 1980, with Interfarma N.V. and hereby commit myself irrevocably"—

THE INTERPRETER: "Towards both. Towards your company and to Interfarma."

THE WITNESS: "To put at your disposal at the first—

THE COURT: What is a "*premiere requisition*"?

THE WITNESS: That is the first.

THE INTERPRETER: The first request.

THE COURT: The first request?

THE WITNESS: The amounts which you might need to—

THE INTERPRETER: To respect. Yes.

THE WITNESS: To meet your commitments resulting from Addendum A.

THE COURT: I see. Well, it is addressed to Sante.

THE WITNESS: It is addressed to Sante. Yes.

THE COURT: All right. It is in effect a guarantee. All right.

EXHIBIT 5

[2226] THE COURT: . . . It comes within that case that Chambers decided that although if a telex went from Los Angeles to Mexico City, it went Dallas, as I recall it and then to San Antonio and then to Mexico City and that was interstate commerce.

So, that doesn't worry me, but what worries me is where have you shown by any evidence that there was a misrepresentation or a false or fraudulent representation to carry out the scheme to defraud made by any of the defendants, any one of the defendants, in furtherance of a scheme?

That is my question.

MR. ARTERBERRY: Yes, Your Honor.

THE COURT: I know your answer will be, "Well, they misrepresented the claim to either Biard or to the Vanden Stocks that they were the owners of the property, Concorde Bridge".

MR. ARTERBERRY: Correct, Your Honor.

THE COURT: Now, the truble with that is I have never heard of any such representation. All they said was they were in control of the Concorde Bridge, by reason of this contract, Exhibit 15, which appears as a portion of Exhibit 24 which is the contract in question.

MR. ARTERBERRY: Your Honor, Roger Biard and [2227] Roger Vanden Stock both testified the defendants told them they owned Concorde Bridge.

THE COURT: I don't think so.

MR. ARTERBERRY: Mr. Biard gave his loan—

THE COURT: I don't think so.

MR. ARTERBERRY: I will stand on the record.

THE COURT: I have been listening for that.

I haven't heard it, so you have not made a prima facie case, so I will not permit counsel to testify. We will settle that tonight.

MR. ARTERBERRY: Your Honor—

THE COURT: You stand on it and I will stand on it too.

MR. ARTERBERRY: Your Honor, I will be happy to show your Honor the testimony.

THE COURT: You will stand on it and I will stand on it too. That is enough.

I will not permit Bressel to testify.

I have never heard any misrepresentation made.

Mr. ARTERBERRY: Your Honor—

THE COURT: Because I have never heard any misrepresentation made to set up a prima facie case.

* * * *

[2236] MR. ARTERBERRY: He got the executed copies, Your Honor. He got an executed copy with a date in it and the date was 31, October '79, almost a full month before that contract of November 20 was entered into.

THE COURT: That is done all the time. You have a date at the top of the thing, but the legal date of it shall be the date that the escrow closes.

MR. ARTERBERRY: Your Honor, the document was dated which suggested—

THE COURT: The note wouldn't be a note until the escrow closed.

MR. ARTERBERRY: Your Honor, it says the date is the date on which escrow closed and, clearly, on 31, October 1979, there was not a contract.

THE COURT: I know, so there was no closing of escrow so that couldn't be the date.

MR. ARTERBERRY: That supported the lie Mr. Biard was told in order to get the money from him.

THE COURT: No, it didn't.

MR. ARTERBERRY: Well, Your Honor—

THE COURT: How do I know? All it says, in effect, is he doesn't have title. He is trying to get title and the date of the mortgage will be the date when escrow closes.

MR. ARTERBERRY: That is not what Biard was told. [2237] He was told they owned the property.

THE COURT: That is what it says and he was given this.

MR. ARTERBERRY: He was told they owned the property in October of 1979.

THE COURT: So what? He was given this, so he couldn't be misled unless he was real stupid and he has $1,000,000. You don't have to be smart to make $1,000,000.

MR. ARTERBERRY: You don't Your Honor, but he was told they owned the property.

THE COURT: Well. I don't think you have a prima facie case.

MR. ARTERBERRY: Your Honor, I'd like to consider this over the evening in order to think about it.

* * * *

[2238] THE COURT: Before the privileged status of these communications can be lifted, the government must first establish a prima facie case of fraud independently of said communications. You have to adduce substantial evidence proving a falsehood.

You haven't produced substantial evidence producing a falsehood. In fact, everything I have seen indicates that the government has taken the same view that Mr. Henriod did, a stupid view of this thing, that this Exhibit 15 was a fail [*sic*—sale] of title to real estate. That is not what it is called. It is merely a contract to purchase provided more was paid.

[2239] MR. ARTERBERY: That is correct, Your Honor, but that is not how it was represented and that is not what the defendants told them.

THE COURT: But—

MR. ARTERBERRY: The defendants—

THE COURT: You have tried to make a case based on that and it is a false understanding of the contract.

MR. ARTERBERRY: I appreciate that, Your Honor.

THE COURT: The contract was not to sell real estate, but it was a contract—it was a purchase contract.

MR. ARTERBERRY: I don't want to take any more of the court's time.

THE COURT: It is entirely different. That is what is so crazy about this thing. You try to make a big federal case out of a purchase of a purchase contract claiming that the purchase was a purchase of realty, which it wasn't.

MR. ARTERBERRY: Your Honor, I don't think the Vanden Stock family intended to pay $2,500,000 for an expired contract, null and void.

THE COURT: It wasn't null and void. Schultz admitted it.

MR. ARTERBERRY: Your Honor, the witness stated it was null and void.

THE COURT: I heard him and I feel absolutely [2240] confident that that contract was still good and valid until at least to the beginning of 1982.

MR. ARTERBERRY: Obviously the court is entitled to his view, but the witness said the contract was null and void.

THE COURT: And then he turned around and said he extended it and he had negotiations and by these negotiations, he extended it.

MR. ARTERBERRY: He said he was submitted other contracts and he refused to sign.

THE COURT: He would have gone along with Exhibit 15 as a contract if they had raised the $8,500,000.

MR. ARTERBERRY: If anybody had brought him the $8,500,000 is what he said, Your Honor.

THE COURT: Three-B investments.

MR. ARTERBERRY: He said Three-B or anyone.

MR. LITT: He specifically said that he would close under this contract.

THE COURT: That was the last question I think Mr. Litt asked him.

MR. ARTERBERRY: Your Honor, I won't take any more of the court's time.

THE COURT: I don't want to take your time, either.

MR. ARTERBERRY: We will try to have something for Your Honor in the morning.

• • • •

[2280] THE COURT: * * * I said that I have no doubt about that that he counseled the two defendants, but there is no showing that I can see that either of the defendants are tied into an artifice or scheme because there is no showing that they misrepresented the ownership when all of my notes show that Blair and Bilton are the only two involved in this. That Blair and Bilton may have gone so far as to say that they controlled it, but there is no evidence that I received from any witness that says they owned it and all of the documents contradict that.

MR. ARTERBERRY: Mr. Vanden Stock testified clearly that he was told by Alan Blair in October of 1980 that he owned Concorde Bridge.

THE COURT: He was so unclear it was pitiful. He [2281] said—he even said, "I must have been mistaken." "I must have been mistaken."

MR. ARTERBERRY: You are thinking about Mr. Henriod who was talking about, I think, at one point your Honor asked him about his understanding. Mr. Vanden Stock said he was not mistaken.

THE COURT: Yes, he did. He said he didn't read it and he didn't understand it and he couldn't read it. What a fool. He should have gotten a lawyer.

MR. ARTERBERRY: Many victims of fraud are not as wise or prudent as they should have been. They make mistakes when they trust people.

THE COURT: Then when they get with the U.S. attorneys, the first thing you know they have changed "control" to "ownership."

MR. ARTERBERRY: Your Honor, the witness' testimony was clear when Mr. Vanden Stock testified.

THE COURT: I used to be there. I know what goes on.

MR. ARTERBERRY: Mr. Vanden Stock said he was told by Alan Blair he owned Concorde Bridge and had to sell it.

THE COURT: Okay. Sorry. I disagree with you. You may have a chance for appeal.

Good luck.

• • • •

[2303] THE COURT: Any communications made in the presence of Van Cauwenberghe—that is one of the reasons that I have held that any representation made to Mr. Van Cauwenberghe is not to the partners because he wasn't a partner.

Now, if you want to make him a partner, you better talk with the attorneys for Mr. Van Cauwenberghe.

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

CIVIL MINUTES—GENERAL

Date April 24, 1986

ORDER TAKING MATTER UNDER SUBMISSION WITHOUT ORAL ARGUMENT

ON THE COURT'S OWN MOTION, IT IS ORDERED that defendant's motion to dismiss and set aside default filed by *defendant Cauwenberghe* and noticed for hearing on April 28, 1986 is hereby taken UNDER SUBMISSION without oral argument. No appearance by counsel shall be necessary on that date and the Court will issue its ruling which will be mailed to counsel when the matter has been decided.

The Clerk shall mail a copy of this Order to counsel.

Initials of Deputy Clerk /s/ N

DECLARATION OF PERCY ANDERSON

[Filed Sept. 10, 1986]

I, Percy Anderson, declare as follows:

1. I am an attorney associated with the law firm of Bryan, Cave, McPheeters & McRoberts, attorneys of record for plaintiff Roger Biard in this action. I am familiar with the facts relevant to a determination of plaintiff's application to reschedule the pre-trial conference and to schedule a new and different discovery cutoff date.

2. The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

3. Plaintiff has made and will continue to exercise diligence in its trial discovery and trial preparation efforts. Plaintiff has attempted to meet the present pretrial schedule—without success. In the interests of justice, due process and to afford plaintiff and defendants a fair trial, and under the pragmatic realities of this complex proceeding, plaintiff respectfully requests that the pre-trial Conference date be continued to December 15, 1986 and that the discovery cutoff date be continued to November 15, 1986.

Relief Requested

4. Plaintiff seeks an Order continuing the pre-trial conference for three (3) months, thereby rescheduling it from September 15, 1986 to December 15, 1986, and concomitantly setting a new discovery cutoff date of November 15, 1986.

Overview of Why Relief is Required

5. First, defendant Wilfried Van Cauwenberghe's failure to comply with the Federal Rules of Civil Procedure relating to discovery continues and has made it impossible to comply with the current schedule. Van Cauwenberghe has repeatedly, and perhaps contumaciously, refused to be deposed, despite having been urged by this

Court to comply. Van Cauwenberghe has thereby stymied plaintiff's efforts to inquire into and develop the facts concerning what plaintiff is convinced is a massive scheme to defraud. This conduct has delayed plaintiff for over three months from beginning the preparation of a major part of its case in chief.

6. Van Cauwenberghe has obstructed plaintiff's discovery and trial preparation in a number of other significant ways that make it impossible to meet the current schedule. For example, when Van Cauwenberghe's deposition was noticed on June 18, 1986, five days following the informal status conference before this Court and the denial of defendant's motion to dismiss the complaint, he filed a motion for a protective order in the United States District Court for the District of Columbia raising the identical issues previously denied by this Court. Significantly, Van Cauwenberghe misled the district court in the District of Columbia to believe that these issues had not been decided by this Court. A true and correct copy of a Supplemental Declaration of Van Cauwenberghe counsel's is attached hereto as Exhibit A. In support of this erroneous contention, Van Cauwenberghe relies upon the Court's failure to have formally issued an Order denying his motion to dismiss, despite having been told by this Court on June 13, 1986 that the motion was denied. Van Cauwenberghe's continued failure to comply with the discovery rules has prevented plaintiff from preparing for trial on issues central to this case.

7. On July 21, 1986, plaintiff noticed Van Cauwenberghe's deposition for August 5, 1986. On August 1, 1986, by letter, Van Cauwenberghe's counsel notified plaintiff that Van Cauwenberghe would not appear at the deposition. A true and correct copy of the letter is attached hereto as Exhibit B.

8. As a result of defendant Van Cauwenberghe's failure to abide by the discovery rules, plaintiff has been

prevented from preparing its case on the basic issue of liability. As can be seen in Exhibit B, Van Cauwenberghe's has taken the position that he has not entered an appearance in this action. Therefore, plaintiff respectfully urges this Court to adopt the Order submitted by plaintiff denying defendant Van Cauwenberghe's motion to dismiss so that the matter may proceed as expeditiously as possible.

9. The magnitude and and complexity of this case make the discovery and pre-trial preparation tasks difficult. Plaintiff has attempted to develop the matters which need to be accomplished under the current discovery and pre-trial conference schedule, but the completion of those matters under the current schedule is legally and logistically impossible. As the Court is aware Van Cauwenberghe was convicted in a companion criminal proceeding. Obtaining the trial transcripts and evidence admitted during the criminal proceeding which are necessary to the presentation of this case cannot be completed under the current schedule. Nor is it possible to prepare all the necessary documents for the "40-day meeting." There are literally hundreds of pages of potential exhibits.

10. Due to Van Cauwenberghe's stalling, plaintiff needs an extension of the pre-trial conference to at least December 15, 1986 and a extension of the discovery cutoff date to November 15, 1986 to conduct adequate discovery.

11. The pre-trial meeting and discovery cutoff should be extended beyond the current schedule. Those requirements necessarily cannot be completed when so much essential discovery remains outstanding. The mass of material involved and the complex nature of the case also prevent compliance with the present schedule. For each of the foregoing reasons, it is respectfully requested that the pre-trial conference be continued to December 15,

1986 and the discovery cutoff date be extended to November 15, 1986.

Notice

12. On September 10, 1986, I placed a telephone call to defendant Van Cauwenberghe's attorney, John G. Kester, and left the following message: On September 10, 1986, I will be filing an *ex parte* application in the United States District Court in which plaintiff Roger Biard will request an Order extending the discovery cutoff date to November 15, 1986, and the pre-trial Conference to December 15, 1986.

13. On September 10, 1986, I placed a telephone call to defendant Gerald L. Bilton's attorney, John G. Kester [*sic*], and left the following message: On September 10, 1986, I will be filing an *ex parte* application in the United States District Court in which plaintiff Roger Biard will request an Order extending the discovery cutoff date to November 15, 1986, and the pre-trial Conference to December 15, 1986.[2] I further advised counsel that he could file any objections with the Court or he could call me to discuss the matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of September 1986, at Los Angeles, California.

/s/ Percy Anderson
PERCY ANDERSON

[2] I have engaged in numerous settlement discussions with Bilton's attorney and feel confident that the action will be settled as to defendant Bilton.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Nov. 17, 1986]

EXCEPTIONS TO PROPOSED ORDER

Undersigned counsel appearing specially for defendant Van Cauwenberghe respectfully except to the following parts of the proposed order submitted by plaintiff on November 12, 1986:

1. The proposed order (at page 2, line 6) incorrectly refers to "the argument of counsel." The Court did not hear argument on these motions.

2. The proposed order fails to dispose of defendant's request for costs and attorneys' fees on the motion with respect to the improperly obtained default and the improper objection to having it set aside, and to strike the default request.

3. Defendant believes that the motion to dismiss filed herein is substantial and meritorious and should not be denied without oral argument and without an opinion explaining the Court's reasoning.

Respectfully submitted,

* * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Lodged Nov. 12, 1886]

[Filed Nov. 17, 1986]

[PROPOSED] ORDER DENYING DEFENDANT WILFRIED VAN CAUWENBERGHE'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND GRANTING DEFENDANT WILFRIED VAN CAUWENBERGHE'S MOTION TO SET ASIDE DEFAULT

Defendant Wilfried Van Cauwenberghe's Motion to Dismiss plaintiff Roger Biard's First Amended Complaint, to Strike Request to Enter Default and to Set Aside Default came on for a determination before the Honorable J. Spencer Letts, United States District Judge, in the United States Courthouse, 312 North Spring Street, Los Angeles, California. Plaintiff Roger Biard appeared and was represented by Bryan, Cave, McPheeters and McRoberts, by Percy Anderson and Albert S. Golbert. Defendant Wilfried Van Cauwenberghe specially appeared and was represented by Williams & Connolly, by John G. Kester.

The Court having read and considered the pleadings, declarations, exhibits, documents on file, admissions of counsel, the memoranda of points and authorities submitted by the parties in support of and in opposition to defendant's motion to dismiss, to strike the request to enter default, and to set aside default, the argument of

counsel, and the Court having found that justice requires that further proceedings in this case be subject to this order,

IT IS HEREBY ORDERED:

That the motion of defendant Wilfried Van Cauwenberghe to set aside default be and it is hereby granted; and

That the motion of defendant Wilfried Van Cauwenberghe to dismiss the plaintiff's First Amended Complaint be and it is hereby denied.

Counsel for plaintiff is directed to serve a copy of this order to the parties appearing herein by United States mail.

DATED: November 17, 1986

/s/ J. Spencer Letts
J. SPENCER LETTS
United States District Judge

Presented By:

BRYAN, CAVE, MCPHEETERS & MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

/s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Lodged Dec. 9, 1986]

[PROPOSED] JUDGMENT

The Motion for Summary Judgment by plaintiff Roger Biard ("Biard") on each of the claims for relief stated in his First Amended Complaint came on for hearing before this Court on January 12, 1987 at 1:00 p.m. Biard appeared and was represented by Bryan, Cave, McPheeters & McRoberts, by Albert S. Golbert and Percy Anderson. Defendant Gerald L. Bilton appeared and was represented by James A. Twitty. Defendant Wilfried Van Cauwenberghe appeared and was represented by Williams & Connolly, by John G. Kester.

The Court, having read and considered Biard's Notice of Motion and Motion for Summary Judgment, the pleadings, affidavits, declarations, the memoranda submitted by the parties in support of and in opposition to the Motion for Summary Judgment, having heard and considered the oral argument of counsel, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Biard's Motion for Summary Judgment be and it hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Biard shall have fourteen (14) from the entry of this Judgment to submit to this Court a State-

ment of Damages, and a Memorandum of Costs, including reasonable attorneys' fees incurred herein.

Dated: January —, 1987

/s/ [Not signed]
J. SPENCER LETTS
United States District Judge

Submitted by:

BRYAN, CAVE, MCPHEETERS & MCROBERTS
ALBERT S. GOLBERT
ANNIE K. BAKER
PERCY ANDERSON

/s/ Percy Anderson
PERCY ANDERSON
Attorneys for Plaintiff
Roger Biard

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

[Filed Dec. 15, 1986]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Wilfried Van Cauwenberghe, a defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's order dated November 17, 1986 denying his motion to dismiss for lack of jurisdiction and service.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER
ROBERT S. LITT
Attorneys Appearing Specially for Defendant Wilfried Van Cauwenberghe

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6735

DC# CV-85-7378-JSL
Central California

ROGER BIARD,

Plaintiff,

vs.

ALAN H. BLAIR, *et al.*,

Defendants,

and

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Jan. 23, 1987]

ORDER

Appellant seeks to appeal the district court's refusal to dismiss the complaint. Appellant's reliance on the collateral order doctrine is questionable.

With 14 days of the entry of this order, appellant shall withdraw this appeal or show cause why it should not be dismissed for lack of jurisdiction. Plaintiff may have 10 days to reply to appellant's response.

If appellant does not comply with this order, the appeal will be dismissed by the Clerk under Ninth Circuit Rule 19(b).

FOR THE COURT:

/s/ Norman P. Vance
NORMAN P. VANCE
Conference Attorney

1.16/7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6735

ROGER BIARD,

Plaintiff-Appellee,

v.

ALAN H. BLAIR et al,,

Defendants.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Feb. 6, 1987]

RESPONSE TO ORDER TO SHOW CAUSE

Appellant submits this memorandum of law in response to the order to show cause entered January 23, 1987. As is set forth below, jurisdiction of this appeal is proper for each of several independent reasons.

* * * *

Appellant of course recognizes that ordinarily a denial of a motion to dismiss—typically, a motion under Rule 12(b)(6), Fed. R. Civ. P., to dismiss for failure to state a claim on which relief can be granted—is not appealable under 28 U.S.C. § 1291. But this was not a Rule 12(b)(6) motion. There is a long-standing and well established class of exceptions to that general rule, and the denial of appellant's jurisdictional motion claiming

immunity clearly falls in that class. Jurisdiction lies here under 28 U.S.C. § 1291 for not just one, but several independent and sufficient reasons.

I. A DENIAL OF A CLAIM OF IMMUNITY IS APPEALABLE UNDER 28 U.S.C. § 1291

Appellant here, as a person brought to the United States for criminal proceedings through the process of extradition, claims a complete immunity from civil process while in this country pursuant to that extradition. Past cases without exception have recognized such immunity.

* * * *

II. THE DISTRICT COURT'S UNEXPLAINED DENIAL OF THE SUBJECT-MATTER JURISDICTION AND *FORUM NON CONVENIENS* MOTION IS APPEALABLE.

Furthermore, there are other aspects of the motion that are appealable. There is no sound basis for allowing this suit—which consists of one resident of Brussels suing one of his Belgian neighbors—to be brought in any court of the United States. It is long settled that a suit between two aliens does not come within the diversity of jurisdiction of the federal courts. *Eze* v. *Yellow Cab Co. of Alexandria, Va., Inc.*, 782 F.2d 1064 (D.C. Cir. 1986); *Cheng* v. *Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983). That immediately disposes of five of the six counts of plaintiff's complaint, all of which claim to be based solely on diversity of citizenship. The remaining count seeks to found jurisdiction on 18 U.S.C. § 1964, the civil RICO statute; but counsel for appellant have been unable to find a single case, and appellee cited none, that would stretch the RICO statute to authorize a suit brought in a United States court by one alien against another. The statute simply does not cover such a case.[6]

[6] To open the doors of United States courts in such a way would be contrary to accepted rules of construing federal remedial statutes. See, *e.g.*, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).

Moreover, the submissions to the District Court established without contradiction that the witnesses in this suit would be overwhelmingly Europeans—most of them not English-speaking—testifying about European business practices and opining on the character and business practices of Europeans—exactly the sort of questions difficult to present to a U.S. jury, and most awkward and difficult for a U.S. tribunal to judge. The District Court's unexplained and arbitrary denial of the *forum non conveniens* motion in such circumstances was wholly at odds with many other cases,[7] and was certainly an abuse of discretion.

* * * *

CONCLUSION

The ruling below was clearly out of line with the decided cases, and review of it is unquestionably within the rule of *Mitchell* v. *Forsyth*, *supra*, and *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*.[9] For the reasons stated, this Court has jurisdiction of this appeal.

Respectfully submitted,

[7] Compare, *e.g.*, *In re Union Carbide Corp. Gas Plant Diaster*, 634 F. Supp. 842 (S.D.N.Y. 1986); *Gardner* v. *Troesch*, No. 84-2116-K (D. Mass. 1986), A.208.

[9] For the District Court to proceed against appellant was so far in excess of its jurisdiction that appellant would have sought mandamus or prohibition, were it not for the fact that denial of the immunity makes appellate jurisdiction clear and therefore the necessary avenue by which to proceed. See *Helstoski* v. *Meanor*, *supra*, 442 U.S. at 506. If this Court were to conclude nevertheless that appellate jurisdiction is lacking, appellant would request that the papers filed herein be treated as an application for leave to file petition for mandamus or prohibition pursuant to 28 U.S.C. § 1651. See *Hartland* v. *Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. C.A. 86-6735

DC No. CV 85-7378-JSL

ROGER BIARD,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Feb. 19, 1987]

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO ORDER TO SHOW CAUSE

Plaintiff-appellee Roger Biard submits this memorandum of points and authorities in reply to Defendant-appellant Wilfried Van Cauwenberghe's response to this Court's order to show cause to dismiss appellant's appeal for want of jurisdiction. As will be demonstrated below, this Court's assumption that it is without jurisdiction to consider this appeal is correct.

* * * *

On February 27, 1986, Van Cauwenberghe filed a motion to dismiss the first amended complaint on the following grounds: (1) a lack of subject matter jurisdiction; (2) a lack of personal jurisdiction because he had been extradited to the United States; (3) for *forum non con-*

veniens; (4) insufficient process; and (5) inadequate service of process.[3]

* * * *

III

ISSUE PRESENTED FOR REVIEW

Whether this Court will decide, without a proper certification by the district court, an appeal of a motion to dismiss resolved by a decision of the district court when there are other claims and other parties that are still pending before that court.

IV

ARGUMENT

A. This appeal does not fall within the narrow class of cases to which the Collateral Order Doctrine applies

Relying on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), Van Cauwenberghe asserts that the district court's refusal to recognize his novel claim of immunity from civil process is immediately appealable under 28 U.S.C. § 1291. The contention is without support in either the facts of this case or in the applicable law. Van Cauwenberghe has demonstrated neither "a serious and unsettled question" nor the requisite irreparable harm warranting an interlocutory appeal. Van Cauwenberghe also contends that the district court's denial of his motion for forum *non conveniens* authorizes an appeal as a matter of right. This argument is also without merit. Indeed, Van Cauwenberghe's response falls well short of the rigorous showing necessary to justify an exception to the final judgment rule.

Van Cauwenberghe's response to this Court's order to show cause constitutes a tired rehash of his prior con-

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[3] On April 18, 1986, Bilton, appeared by filing an answer denying each of the allegations in the Complaint and demanding a jury trial.

tentions before the district court with misleading references to the record below and controlling case law.[4] In short, Van Cauwenberghe's effort to obtain an immediate review before this Court is frivolous.

* * * *

Van Cauwenberghe requests that if this action is not immediately appealable, his response be treated as an application for mandamus pursuant to 28 U.S.C. § 1651. The writ of mandamus does not lie to remedy mere error or even an abuse of discretion; rather, this drastic remedy is granted only in exceptional circumstances amounting to an usurpation of power by the district court in order to confine the district court to a lawful exercise of its prescribed jurisdiction. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), *aff'g*, 511 F.2d 192 (9th Cir. 1975).

The Ninth Circuit has set forth five specific guidelines which it uses in considering the issuance of a writ of mandamus: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal (this guideline is closely related to the first); (3) the district court's order is deemed erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important matters, or issues of law of first impression. *Bauman v. United States District Court*, 557 F.2d 650,

[4] For example, Van Cauwenberghe's asserts that none of the defendants defended this action. Van Cauwenberghe's Response at p. 1. Defendant Bilton appeared and filed an answer denying each of the allegations. Furthermore, Van Cauwenberghe asserts that jurisdiction in this action was based on diversity of citizenship. Van Cauwenberghe's Response at p. 2. The complaint was based solely of jurisdiction under the Racketeer Influenced and Corrupt Organizations Act. See Complaint at p. 6.

654-55 (9th Cir. 1977). None of these guidelines provides the relief Van Cauwenberghe requests. Van Cauwenberghe essentially claims that the district court erred in refusing to grant his motion to dismiss, therefore, mandamus should not lie.

V

CONCLUSION

The collateral order doctrine is inapposite in the circumstances of this case. The doctrine applies only to resolve important issues that are effectively unreviewable on appeal from a final judgment. *See United States v. Ohnick*, 803 F.2d 1485, 1487 (9th Cir. 1986); *United California Bank v. Fadel*, 482 F.2d 274 (9th Cir. 1973); *Chaparral Communications, Inc. v. Boman Industries, Inc.*, 798 F.2d 456, 459 (Fed. Cir. 1986) (the need for an immediate appeal was clearly outweighed by the policy against piecemeal adjudication); Moore's Federal Practice, ¶ 54-31, (2d ed. 1976).

Though there may be exceptional cases where an appellate court is justified in utilizing the *Cohen* doctrine, this is not such a case. Adopting Van Cauwenberghe's argument would improperly extend the narrow *Cohen* exception to orders that are unimportant and are capable of review at the conclusion of the trial. For all of the foregoing reasons, Van Cauwenberghe's appeal should be dismissed.

DATED: February 17, 1987

Respectfully submitted,

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6735

DC# CV-85-7378-JSL
Central California

ROGER BIARD,
Plaintiff,

vs.

ALAN H. BLAIR, *et al.*,
Defendants,

and

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed July 7, 1987]

ORDER

Before: BROWNING, ALARCON and THOMPSON, Circuit Judges

This appeal is dismissed for lack of jurisdiction. *See Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

MoCal 6/26/87

SUPREME COURT OF THE UNITED STATES

No. 87-336

WILFRIED VAN CAUWENBERGHE,
Petitioner

v.

ROGER BIARD

ORDER ALLOWING CERTIORARI

Filed November 9, 1987

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is a district court's order denying an extradited person's claim of absolute immunity from civil process appealable to the court of appeals under 28 U.S.C. § 1291, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)?

2. Is a district court's order denying a motion to dismiss on grounds of *forum non conveniens* appealable to the court of appeals under 28 U.S.C. § 1291 and the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-336

WILFRIED VAN CAUWENBERGHE, *Petitioner*,

v.

ROGER BIARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The order of the Court of Appeals dismissing petitioner's appeal is at J.A. 234.[1] The order of the District Court denying petitioner's motion seeking dismissal based upon absolute immunity and *forum non conveniens* is at J.A. 221. Both are unreported.

JURISDICTION

The order of the United States District Court for the Central District of California denying Petitioner's claims of absolute immunity and *forum non conveniens* was entered on November 17, 1986. J.A. 221. A timely notice of appeal was filed on December 15, 1986. J.A. 225. The judgment of the United States Court of Appeals for the Ninth Circuit was entered July 7, 1987. J.A. 234. The petition for certiorari was filed August 27, 1987, and

[1] Citations to "J.A." are to the Joint Appendix filed herein.

certiorari was granted November 9, 1987. J.A. 235. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND TREATY INVOLVED

Title 28 U.S.C. § 1291, 18 U.S.C. §§ 3186 and 3192, and pertinent portions of the Treaty Between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, 31 Stat. 1928, are reprinted in the Appendices.

STATEMENT

This is a civil suit brought by one Belgian against another in the United States District Court for the Central District of California.

Petitioner, for thirty years a real estate broker in Brussels, was sued by respondent, a Brussels neighbor and long-time acquaintance [2] who owns a brokerage house, J.A. 30, for fraud, breach of contract, and related common-law claims, with a count under the civil RICO statute, 18 U.S.C. § 1964. J.A. 8, 30, 33, 36, 84, 106, 113. The suit alleged that petitioner had induced respondent to lend $1 million to a real estate partnership called Three B Investment Associates, secured by a mortgage in Kansas. When only $800,000 of the loan was repaid, and the security proved worthless, respondent claimed he had been defrauded.

A. The Underlying Dispute.

Except as concerned petitioner's state of mind, the facts giving rise to the quarrel between respondent and petitioner have never been materially disputed. After discussions in 1979 in their home city of Brussels, J.A. 85, petitioner as a real estate broker had encouraged respondent to meet one Alan Blair, a French-speaking American who lived in Europe and was married to a

[2] Respondent described petitioner as "a member of a Brussels family well known to me and my family," and stated that "I have known Wilfried Van Cauwenberghe for many years." J.A. 30, 33; see also J.A. 113.

Belgian. J.A. 85, 204. Blair at the time was in Los Angeles, and Blair's Three B [3] real estate partnership was seeking investors. J.A. 87. Respondent while in the United States on other business did visit Los Angeles for three days, J.A. 91, and while there, in addition to social activities, J.A. 86, discussed investments with petitioner, petitioner's brother, and Blair. J.A. 86, 88, 89, 98-99. Petitioner according to respondent did "[n]ot specifically" describe the investment, J.A. 98, but Blair did. J.A. 98-99. Petitioner, who as he had in Brussels encouraged respondent to invest, J.A. 87, did not speak English. J.A. 204, 114. Respondent agreed to lend the partnership $1,000,000 for three years at 20% per annum interest, secured by a mortgage on apartments near Kansas City. Petitioner delivered the partnership's note and a mortgage document to respondent the following month at his office in Brussels, J.A. 90. At the time, the partnership held a valid contract to purchase the property and had made a substantial deposit. J.A. 35, 212.

Three years passed. In the meantime Blair made "many, many" visits to Brussels, J.A. 95, during which he told respondent the investment was proceeding well. J.A. 92-95. Petitioner, also in Brussels, repeated the same thing. J.A. 92-94. Two scheduled annual installment repayments, totalling $800,000, were duly received by respondent from Blair. J.A. 32, 100-02. At the end of the third year, however, the final installment was not repaid. J.A. 32. Respondent asked for payment from Blair, J.A. 32, 97, and then from petitioner, J.A. 32. Respondent thereafter claimed that he had been misled into believing the partnership had already acquired title to the

[3] The partnership was called Three B Investment Associates. The Government alleged in the criminal trial that the members were not just Blair and two other Americans named Bilton and Bressel, but also included Van Cauwenberghe. See J.A. 25. However, the trial court in that case disagreed, saying that "I have held that any representation made to Mr. Van Cauwenberghe is not to the partners because he wasn't a partner," and "Blair and Bilton are the only two involved in this." J.A. 213, 214.

security when he agreed to the loan, J.A. 211, even though the documents on their face had shown it held only a purchase contract. J.A. 209-11. Soon after the default, respondent filed a complaint against Blair in Switzerland. J.A. 100, 105. He told the Swiss that "I handled the whole matter with Blair." J.A. 109. That complaint made no mention whatsoever of petitioner. J.A. 109. After investigation, the Swiss judge declined to take any action. Respondent conceded that in spite of repeated demands on Blair, he had never made any written demand for payment on petitioner. J.A. 108.

Respondent then retained U.S. counsel, who contacted U.S. prosecutors. J.A. 99-100. Respondent for the first time added an allegation that petitioner, the real estate broker, had also been culpable, because petitioner had introduced respondent to Blair and had assisted Blair by depositing the original check in an account controlled by Blair. J.A. 109. This allegation resulted in petitioner's being named in a U.S. indictment in October 1984 in the Central District of California, U.S. criminal jurisdiction being based on respondent's visit there. It charged Blair, another American, and petitioner with wire fraud and with causing interstate transportation of a victim of fraud (18 U.S.C. §§ 1343 and 2314). J.A. 52.[4]

B. The Extradition and Criminal Trial.

In January 1985 petitioner was requested by respondent's Swiss attorney to travel from Belgium to a meeting in Geneva, Switzerland to discuss using petitioner's good offices to try to arrange a settlement with Blair, who a month previously had been arrested in London pursuant to the indictment and held for extradition to the United States. Petitioner agreed to try to help, and as requested flew from Brussels (from which, as a Belgian national, he could not be extradited) to Geneva to visit respondent's lawyer. J.A. 174. However, when he stepped off the airplane in Geneva, he was immediately arrested pursuant to a request from U.S. authorities under the applicable extradition treaty with Switzerland. Treaty of May 14, 1900 Between the United States and Switzerland for the Extradition of Criminals, 31 Stat. 1928. After legal proceedings in the Swiss courts he was extradited and, pursuant to the treaty, delivered to Los Angeles by United States Marshals.

The trial judge in the criminal proceedings repeatedly expressed doubt as to petitioner's guilt, and about the prosecution's theory that petitioner had been a knowing partner of Blair's. J.A. 209-14.[5] The court observed, and the prosecutor agreed, that the mortgage and note had not contained any misleading information, and had in fact disclosed that the contract had not yet closed and that legal title had not yet been obtained. J.A. 209-11. The prosecutor also acknowledged that the prosecution's case depended on what the French-speaking individuals had said to each other in various conversations, most of which had occurred in Europe. J.A. 211. The prosecution's theory was that petitioner's conversations with respondent, extending over a three-year period from 1979 to 1982, including discussions both before and after the loan was made and continuing during the repayment period, amounted to petitioner's participation in a scheme to defraud. J.A. 53-55, 209.

After three days of deliberations, the jury found all three defendants guilty of one count of wire fraud and one count of causing interstate transportation of a victim of fraud. The trial judge in the end declined to set aside the jury's verdict, commenting with respect to petitioner that, "I know he's a nice man, he never has been in trouble," and that "he had an excellent reputation and char-

[4] The indictment also contained a conspiracy count, which was dismissed before trial, and four additional counts alleging violations of § 1343 and § 2314 with respect to other Belgian entities which were never tried and were dismissed after trial. The indictment contained no RICO charge. J.A. 52.

[5] Respondent's complaint in the present case alleged that it was Blair and his wife who had "total dominion" over the Three B partnership. J.A. 10, 39.

acter but they still came in with a conviction."[6] Petitioner was sentenced to the time he had already served in pretrial confinement, ordered to pay respondent restitution of $34,501.26, and placed on probation. J.A. 134-35.[7]

C. The Civil Suit.

A few days after the sentencing, when petitioner arrived at the office of his probation officer for his first scheduled appointment, he was handed the summons and amended complaint in this civil suit, seeking in excess of $19,000,000 in compensatory and punitive damages. J.A. 113, 138.[8] Respondent's counsel explained that no service had been made until after the trial "because of case authority questioning the validity of serving a defendant during a compelled appearance in a judicial proceeding." J.A. 130.

D. Petitioner's Claims of Immunity and *Forum Non Conveniens.*

Petitioner through a special appearance promptly moved to dismiss the civil complaint on several indedent grounds. Two of those give rise to the questions presented here.[9]

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[6] R., C.A., No. 87-703, at 1020, 1023.

[7] The conviction was affirmed, except as to the propriety of one condition of probation, by the Ninth Circuit. *United States* v. *Van Cauwenberghe*, 814 F.2d 1329, *amended on rehearing*, 827 F.2d 424 (9th Cir. 1987). A petition for certiorari is pending. No. 87-703.

[8] No other form of service was ever attempted. Also named as defendants were Blair and Bilton (who was a resident of Indiana), the Three B limited real estate partnership, and Blair's wife, a Belgian. J.A. 8-9, 113. Blair defaulted, summary judgment was entered against Bilton, and the other defendants were never served. Only petitioner, because of the extradition, had substantial assets in the United States. See p. 44, *infra*.

[9] Petitioner also moved to dismiss for deficiencies in process and service of process, and also for lack of subject-matter jurisdiction. J.A. 79, 83. The District Court (Rymer, J.) at first issued an order to show cause why the complaint should not be dismissed for lack of jurisdiction, J.A. 64, but before further action was taken, the case

Petitioner moved to dismiss, first of all, on the ground that because his presence in this country had been obtained solely as a result of extradition proceedings, he therefore was absolutely immune from civil suit in this country. J.A. 81, 142. He relied in particular on *United States* v. *Rauscher*, 119 U.S. 407 (1886), and a number of cases following it that recognize the civil immunity of extradited persons.

Petitioner also moved to dismiss the complaint on grounds of *forum non conveniens.* J.A. 81. Citing *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), he pointed out with supporting affidavits, J.A. 113, 163, and testimony of respondent himself, J.A. 84-112, 171, 187-202, that both petitioner and respondent, as well as most witnesses, were native speakers of French, J.A. 110, 114, 168, 202, 204-205, 207; that both were citizens of Belgium and residents of Brussels, J.A. 30, 113, 168; that petitioner's knowledge of English was extremely limited, J.A. 114; that the majority of the witnesses at the criminal trial had been Europeans, the three principal ones had been Belgians or French-speaking Swiss, and nearly all witnesses for both sides in a civil trial would be Europeans, J.A. 163-64;[10] that petitioner was unable to pay for the transportation of witnesses from abroad, J.A. 156-66; that the criminal trial had required extensive (and sometimes ineffective) assistance of translators, both for

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was transferred to a newly appointed judge (Letts, J.), who denied the motion to dismiss as to all grounds raised. J.A. 221; see also J.A. 130-31; n.62, *infra*.

[10] Petitioner by affidavit listed by name the witnesses petitioner would seek to call at a civil trial. J.A. 164-65. Of the witnesses to the events, 7 were Belgians (one resident in Great Britain) and the other 4 were Swiss. J.A. 164-65. In addition, of his 14 character witnesses, all of whom submitted supporting letters, all were Belgians. J.A. 166. Most of them did not speak English. J.A. 166. All five of his defense witnesses were Belgians, three of them requiring assistance of translators. J.A. 164. All three of the principal prosecution witnesses were Belgian or Swiss. J.A. 163. Many exhibits were documents written in French or Flemish. See, *e.g.*, J.A. 187-208.

French and for Flemish, J.A. 89, 111-12, 187-89, 193-206; that nearly all meetings and conversations testified about at the trial had occurred in Brussels or Geneva, J.A. 54, 85, 90-97, 176, 207-08, and crucial documents and witnesses had been and still were available only in Europe, J.A. 104, 166, 178-82, 185-86.

Petitioner argued further that nuances and customs of Belgians in mutual business dealings, issues central to the case, would be alien to a California jury, as would be the norms of Belgian commercial practices. J.A. 82. He further pointed out that respondent had testified that he had retained counsel back home in Belgium, J.A. 106, 173-74, that the courts were open and he could conveniently sue petitioner there, J.A. 108, but that he had not filed any complaint or civil action against petitioner there—in respondent's words, "so far." J.A. 108; see also J.A. 113, 171.

Respondent argued, in opposition to the motion, that "the transcripts of the defendant's criminal trial are located in the Central District of California," Pl. Opp. at 22, and that "Much of the evidence that will be utilized in this action is in the possession of the Clerk of the United States District Court for the Central District of California." *Ibid.* He added that "Although California may not be the most convenient forum for the defendant, that is not the test." J.A. 145.

E. The District Court's Order.

The District Court set petitioner's motions for hearing, but then changed its mind and *sua sponte* ordered them off the calendar. J.A. 215. In spite of petitioner's request for a hearing and statement of reasons to support any ruling, J.A. 220, the District Court with no explanation summarily denied the motions. J.A. 221.

F. The Court of Appeals' Dismissal.

Petitioner filed a timely appeal under 28 U.S.C. § 1291. J.A. 225.[11] The Ninth Circuit, in an order signed by a

[11] After the appeal was filed, the District Court proceeded with the case in spite of the fact that no general appearance had been entered for petitioner. On respondent's unopposed motion it entered summary judgment against petitioner on the RICO count for treble damages of $1.8 million, plus attorneys' fees of $75,000.00.

"Conference Attorney," directed petitioner to show cause why the appeal should not be dismissed, stating that "Appellant's reliance on the collateral order doctrine is questionable." J.A. 226.

In support of appealability of the denial of his claim of civil immunity, petitioner cited *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and this Court's holding in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), that

> "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525.

He also relied on other immunity cases that had held appeals from rejection of immunity claims proper under 28 U.S.C. § 1291, including *Abney* v. *United States*, 431 U.S. 651 (1977), and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). He also cited cases from several federal circuits upholding the civil immunity of extradited persons.

In support of appealability of the District Court's order denying his motion to dismiss for *forum non conveniens*, petitioner cited once more *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as well as Fourth Circuit cases so holding, including *Hodson* v. *A. H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983), and also the extensive opinion of two D.C. Circuit judges in *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.) (statement of Wilkey and MacKinnon, JJ.), *cert. denied*, 461 U.S. 970 (1983) (Blackmun and Powell, JJ., dissenting). Petitioner acknowledged that some other circuits had taken a contrary view, but argued that as a practical matter if an alien defendant's claim of *forum non conveniens* is not considered on appeal initially, then after final judgment the protection against trial that is afforded by the doctrine is totally negated. He further emphasized

that what was at stake in the present case was not merely a disagreement about a district judge's weighing of convenience factors, but rather an appeal from a district court's failure—contrary to well established legal requirements when deciding a *forum non conveniens* motion—to make any findings or determinations at all to support its ruling. J.A. 228-29.[12]

The Ninth Circuit dismissed the appeal. It entered an order which read in its entirety:

> "This appeal is dismissed for lack of jurisdiction. *See Cohen* v. *Beneficial Industries* [sic] *Loan Corp.*, 337 U.S. 541 (1949); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)." J.A. 234.

When petitioner sought review in this Court, respondent acknowledged that "the issue of *absolute* immunity justifies an exception under *Cohen*." Opp. to Pet'n for Cert. at 16 (emphasis in original). Respondent also agreed that

> "Respondents are [*sic*] free to sue Petitioner in Belgium, or obtain jurisdiction over him in this country once the protection afforded by the rule of specialty expires." *Ibid.*

This Court granted certiorari. J.A. 235.

SUMMARY OF ARGUMENT

The Ninth Circuit's summary dismissal of petitioner's appeal should be reversed, and the complaint ordered dismissed, for either of two independent reasons.

First, the dismissal is utterly irreconcilable with this Court's unequivocal holding in *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985), that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment." Petitioner's claim was exactly that:

[12] Petitioner also requested that if the Court of Appeals entertained doubts as to appealability, it treat the papers as a petition for mandamus pursuant to 28 U.S.C. § 1651. J.A. 229. Respondent opposed mandamus. J.A. 232-33. The Court of Appeals' summary dismissal made no mention of the alternative prayer.

a claim of absolute immunity from civil suit that depended on his presence by extradition to this country. He invoked the longstanding rule, never questioned in any reported case for more than a century, that when a person is brought to this country by extradition for the purpose of criminal proceedings, he is while here by virtue of that status immune from civil suit. That rule, flowing from *United States* v. *Rauscher*, 119 U.S. 407 (1886), rests both on the purpose and understanding of international extradition treaties, as well as the intent of the federal extradition statutes. It also recognizes the practical need to assure other countries that if they cooperate with U.S. officials in criminal law enforcement, their cooperation will not be abused for private civil purposes.

This first issue, indeed, has now been virtually conceded by respondent in this Court. Even respondent has finally acknowledged that "the issue of *absolute* immunity justifies an exception under *Cohen*." Opp. to Pet'n for Cert. at 16. Earlier respondent had also recognized the "case authority questioning the validity of serving a defendant during a compelled appearance in a judicial proceeding." J.A. 138, 157. This was a claim of absolute immunity from suit, and therefore appealable. Moreover, the claim clearly was well taken, as this Court on this record can proceed to rule. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.33 (1982).

Petitioner's other basis for appeal, his amply supported claim of *forum non conveniens*, also should not have been dismissed by the Court of Appeals. Denial of a substantial motion to dismiss for *forum non conveniens* meets all the collateral-order criteria of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978)—particularly when, as here, the District Court's order was simply a summary unexplained ruling that failed on its face to comply with the applicable requirements for disposing of such motions. Although some courts of appeals have held that ordinary denials of *forum non conveniens* claims do not come within the collateral-appeal rule, none of those

has so held with respect to a bare unexplained order like the one entered by the District Court here, that with none of the required findings rejected *forum non conveniens* entirely. Indeed, had the Ninth Circuit not dismissed the appeal for lack of jurisdiction, the District Court's total failure to make the required findings made the case one for summary reversal.

Moreover, the Fourth Circuit has held for several years that denials of *forum non conveniens* claims are appealable as such, on the reasoning of the leading opinion of Judge Wilkey of the District of Columbia Circuit in *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.) (statement in support of *en banc* review), *cert. denied*, 461 U.S. 970 (1983), an opinion with which Justice Powell expressed his agreement. 461 U.S. 970. The issue is seldom complex. As the Second Circuit has pointed out, "[a] motion to dismiss for *forum non conveniens* does not call for a detailed development of the entire case" and "is limited to the location of important sources of proof." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 451 n.3 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

The concern at root is a practical one. Unless a *forum non conveniens* denial is reviewed before trial, as a practical matter it cannot be effectively reviewed at all. Courts of appeals understandably are not inclined to throw out an entire completed proceeding after trial and final judgment, just to send the parties to start all over in another country; in the past fifty years, only one reported case has ever done so. See pp. 30-31, *infra*. Moreover, because orders *granting forum non conveniens* motions are always immediately reviewable because they are final judgments, the practical effect of excluding meaningful review of *denials* would be to favor the bringing of foreign-centered litigation into U.S. courts: for if a district court dismissed for *forum non conveniens*, the ruling could be promptly reviewed and possibly reversed; but if, as here, the district court refused to dismiss a foreign-centered case, review of the ruling would

likely never come. The effect would be to encourage "[t]he flow of litigation into the United States," contrary to this Court's warning in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 (1981). Prompt review will not overload the dockets of the courts of appeals, but rather will help relieve those of the district courts.

ARGUMENT

I. DENIAL OF AN EXTRADITED PERSON'S CLAIM OF IMMUNITY FROM CIVIL SUIT IS APPEALABLE UNDER 28 U.S.C. § 1291.

A. Denial of a Substantial Claim of Absolute Immunity Is Appealable.

Petitioner here claimed an absolute immunity from civil suit. He did so on the ground that his presence had been obtained by extradition, and that therefore he was immune from compelled participation in judicial proceedings, except of course the criminal prosecution and detention for which extradition had been granted. After this Court's ruling in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), there simply is no room for doubt that denial of a claim of absolute immunity, if that claim is substantial, is appealable under 28 U.S.C. § 1291. This Court's unanimous [13] holding was:

> "[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, *supra*, 472 U.S. at 525.

It is difficult to imagine how this Court could have spoken more plainly.

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[13] The quoted portion of the Court's opinion was also joined by Justice O'Connor and Chief Justice Burger, who wrote concurring opinions. Justice Stevens, concurring, reached the merits without expressing any reservation about appealability. The dissent by Justice Brennan, joined by Justice Marshall, agreed that "denial of absolute immunity is immediately appealable." *Id.* at 543. Then Justice Rehnquist did not participate.

What petitioner asserted here was "a right not to be tried," *Flanagan* v. *United States*, 465 U.S. 259, 267 (1984), which this Court has called "crucial" to the appealability determination. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982). He claimed the right not to be put to the "personal strain, public embarrassment, and expense," *Abney* v. *United States*, 431 U.S. 651, 661 (1977), of having to defend himself in a civil suit in this foreign country where he was present only because of extradition. He "is contesting the very authority . . . to hale him into court to face trial." *Abney* v. *United States*, *supra*, 431 U.S. at 659. The claimed entitlement is to be spared "not only from the consequences of litigation's results but from the burden of defending . . . ." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). That right "would be irretrievably lost if review were postponed until trial is completed." *Flanagan* v. *United States*, *supra*, 465 U.S. at 266; see also *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978) (distinguishing claim of prejudice from pretrial delay).

This Court has unfailingly recognized appealability when such a claim of a "right not to be tried" has been invoked in various contexts. Immediate appeal has been allowed in criminal proceedings in *Richardson* v. *United States*, 468 U.S. 317, 320 (1984) (double jeopardy); *Abney* v. *United States*, *supra* (double jeopardy); see also *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech and Debate Clause); *Stack* v. *Boyle*, 342 U.S. 1 (1951) (bail reduction).[14]

Appealability also has been recognized for claims of various immunities from civil suit. *E.g.*, *McDonald* v. *Smith*, 472 U.S. 479, 482 n.3 (1985) (Petition Clause of the First Amendment); *Nixon* v. *Fitzgerald*, *supra* (official immunity); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 n.11 (1982) (same); *Segni* v. *Commercial Office*, 816 F.2d 344 (7th Cir. 1987) (immunity under Foreign Sovereign Immunities Act); *Commuter Transp. Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) (governmental immunity from antitrust suits). Even when the immunity claimed is not, as here, absolute, but rather only a qualified immunity, *Mitchell* held that denial is immediately appealable. It involves, as here, not a defense to liability, but rather an entitlement not to have to go to trial.

[14] The courts of appeals have also recognized the appropriateness of such appeals in criminal cases. See *United States* v. *Claiborne*, 727 F.2d 842, 844 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984) (asserted immunity of federal judge from prosecution); *United States* v. *Hastings*, 681 F.2d 706, 708-09 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983) (same); *United States* v. *Myers*, 635 F.2d 932, 935-36 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) (asserted immunity of member of Congress).

Denial of a claim of immunity from suit is appealable because such a denial meets the three criteria highlighted in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and amplified in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978):

(1) "The order must conclusively determine the disputed question . . . ." The District Court's order here unambiguously rejected the claim of immunity.

(2) The order must "resolve an important issue completely separate from the merits of the action." That also was the case here; the immunity from civil suit of a person whose presence in the United States was obtained by extradition is "a pure issue of law," *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982), and the answer has nothing to do with the merits of the suit itself. In considering petitioner's claim,

> "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law . . . ." *Mitchell* v. *Forsyth*, 472 U.S. at 528.

(3) Finally, the resolution of the issue must be "effectively unreviewable on appeal from a final judgment." That obviously is the case when immunity from process

and trial is denied, because the right asserted is "its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, *supra*, 472 U.S. at 525. It is lost if the case must be defended.

It now appears that, in this Court, even respondent agrees that "the issue of *absolute immunity* justifies an exception under *Cohen* . . . ." Opp. to Pet'n for Cert. at 16 (emphasis in original). Respondent then falls back to argue that petitioner's immunity from suit in the United States should not be considered "absolute" because petitioner can be sued in Belgium (or sued in this country if the facts were different and he were not here under compulsion of the criminal proceeding). *Id.* But it is of course immunity from suit *in a U.S. court* that is at issue, and that is what all the cases talk about.[15] Denial of petitioner's claim of absolute immunity from U.S. civil suit entitles him to an immediate appeal unless the claim is not "substantial." *Mitchell*, *supra*, 472 U.S. at 525. That element is considered in the following section.[16]

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[15] *Abney*, *supra*, for example, allowed appeal of denial of a federal double-jeopardy motion even though state prosecution would not be precluded under *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). *Cf. also Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 9 n.8 (1983): "'[e]ffectively out of court' means effectively out of *federal* court —in keeping with the fact that the decision under appeal is the refusal to exercise *federal* jurisdiction." (Emphasis in original.)

[16] In determining the substantiality of petitioner's claim of immunity, it is appropriate for this Court to decide the merits of that purely legal issue:

> "Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. . . . [C]oncerns of judicial economy fully warrant our decision of the important question presented." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

See also *Richardson* v. *United States*, 468 U.S. 317, 322 (1984); *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) ("the purely legal question on which Mitchell's claim of immunity turns is 'appropriate for our immediate resolution' notwithstanding that it was not addressed by the Court of Appeals") (quoting in part *Nixon*, *supra*).

B. An Extradited Person Is Immune From Civil Suit.

Petitioner's claim of immunity is not just substantial. It is compelling. It is supported by an unbroken line of authorities so holding, without exception, going back a hundred years, including decisions of this Court. And it reflects sound policy considerations.

1. Civil Immunity of Extradited Persons Has Invariably Been Recognized.

What petitioner invoked here was a long recognized personal "immunity" from suit, *Collins* v. *O'Neil*, 214 U.S. 113, 120 (1909), created by special provisions of law and treaty, and attaching to his unique status in this country. The rule in the United States for more than a century has been that as a "general principle," when a person is extradited pursuant to an extradition treaty, "it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty." *United States* v. *Rauscher*, 119 U.S. 407, 420 (1886). Mr. Justice Miller writing for the Court explained emphatically that "it is for a limited and defined purpose that the transfer is made," and "it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty." 119 U.S. at 422. When extradited, petitioner "came to this country clothed with the protection which the nature of such [extradition] proceedings and the true construction of the treaty gave him." *Ker* v. *Illinois*, 119 U.S. 436, 443 (1886). The immunity he claimed reflects a recognized governmental policy, designed to respect national sovereignty and encourage international law enforcement, and as an incident thereto to protect individuals in these unusual circumstances from the burdens of civil litigation.

Although this Court in *Rauscher* recognized immunity from criminal rather than civil prosecution, see 119 U.S. at 427, there has never been a doubt expressed since that landmark case was decided in 1886 that an extradited person is to be free from any judicial interference in this country, except of course the criminal prosecution for which he was brought here.[17] This Court itself reminded the lower courts of the *Rauscher* principle that "Care should doubtless be taken that the [extradition] treaty be not made a pretext for collecting private debts, wreaking individual malice . . . ." *Grin* v. *Shine*, 187 U.S. 181, 185 (1902). Extradition entails "the right to have the offence for which he was extradited disposed of and then to depart in peace," or there would be "abuse of the high process under which he was originally brought into the United States." *Cosgrove* v. *Winney*, 174 U.S. 64, 69 (1899). Extradition treaties "manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose." *Johnson* v. *Browne*, 205 U.S. 309, 320 (1907).

Accordingly, the logic of the *Rauscher* opinion, resting ultimately on the whole structure and purpose of the extradition system, was immediately and unhesitatingly applied to assure immunity from civil actions as well:

> "It is certain that no government surrenders a person for the purposes of arrest in a civil action; and such an arrest is as much an infringement of personal liberty and a diversion of the object of the treaty as an arrest for crime; and there is the less justification for the former, since the courts of all civilized countries are alike open for the prosecution of money demands, while crimes can be punished only within the jurisdictioun where committed." *In re Reinitz*, 39 Fed. 204, 207 (C.C.S.D.N.Y. 1889).

[17] Prior to *Rauscher* there had been disagreement in the lower courts on the question, and the case came up to this Court on certificate of division of the two judges below, one of whom had authored earlier decisions rejecting the rule this Court then adopted in *Rauscher*.

It was recognized that the function of extradition is both important, and narrowly focused: it is to permit a measure of international criminal law enforcement, by assisting criminal prosecutions, in precisely stated and agreed upon circumstances.[18] It is not intended to enable civil litigation in the demanding country and thus transplant civil litigation to a foreign forum. To do so would be at odds with the assumptions of international extradition treaties, which confine themselves to criminal law enforcement, and indeed traditionally deny extradition for offenses which are thought to be too close to the civil in nature, such as tax or fiscal violations. "[C]ertainly a court should not allow itself to be made the instrument of perverting the process of extradition to serve the purposes of a private litigant who was instrumental in having that process resorted to . . . ." *Smith* v. *Government of the Canal Zone*, 249 Fed. 273, 279 (5th Cir. 1918). "Extradition proceedings must be prosecuted by the foreign government in the public interest, and may not be used by a private party for private vengeance or personal purposes . . . ." *President ex rel. Caputo* v. *Kelly*, 92 F.2d 603, 605 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938). Subjecting the extradited person to civil suit would be "a malappropriation of the extradition proceeding, and a perversion of its purpose." *In re Baruch*, 41 Fed. 472, 473-74 (C.C.S.D.N.Y. 1890). As the *Rauscher* holding has always been applied in civil cases,

> "the fundamental principle which was laid down as the basis of the decision in the *Rauscher Case* seems to me to be equally applicable here. That principle is that the proceeding under the treaty is for a limited and defined purpose only, and that the exercise

[18] It is, of course, recognized that after extradition it is "the prosecutorial authorities and courts of the demanding State, whose duty it is to justly enforce the demanding State's *criminal* law." *California* v. *Superior Court*, 107 S.Ct. 2433, 2438 (1987) (interstate extradition) (emphasis supplied).

of jurisdiction over the prisoner for any other purpose than that mentioned in the treaty, until he has an opportunity to return, is a fraud upon the rights of the party extradited, and bad faith to the country which permitted the extradition." *In re Baruch*, *supra*, 41 Fed. at 473.

That is exactly this case. Respondent seeks to take advantage of the extradition to use U.S. laws and courts against an alien in a country where petitioner was held only by the compulsion of a criminal extradition treaty —and incidentally to avoid resolution of their civil differences in the courts of the country where both live and are known. See J.A. 30, 33, 106, 102, 108, 113, 171. But petitioner was not brought to this country pursuant to the awesome machinery of international extradition to be civilly sued here. "[H]is enforced presence under a federal law for treaty purposes, and for this special purpose only, is a presence which no other persons have a right to take advantage of." *In re Baruch*, *supra*, 41 Fed. at 474; see also, *e.g.*, *Blumen* v. *Haff*, 78 F.2d 833, 835 (9th Cir.), *cert. denied*, 296 U.S. 644 (1935); *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934) ("a prisoner may not be subject to arrest on civil process after extradition from a foreign country . . . .").[19] Every single case that has ever considered the point since *United States* v. *Rauscher*, *supra*—without exception—has unhesitatingly recognized the immunity petitioner claimed here.

That many of the cases are old is not surprising. So is the principle. It has long been firmly settled. Attempts to sue an extradited defendant have been virtually unheard of, probably because any prospective plaintiffs with lawyers in this country are soon advised that an extradited person has civil immunity. In fact, in this very case respondent's counsel acknowledged that at first he refrained from attempting to serve process on petitioner

[19] There is no distinction in the cases between proceedings begun with civil arrests and those begun with civil summonses. See, *e.g.*, *Smith* v. *Government of the Canal Zone*, *supra*; 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 271-72 (1891).

precisely because of "case authority questioning the validity of serving a defendant during a compelled appearance in a judicial proceeding." J.A. 130.[20]

2. *The Immunity Is Based On Statute, Treaty and Common Law.*

(a) *The Extradition Statutes Require Immunity.*

This Court in *Rauscher* relied also on two statutes which, it said, "[i]f there should remain any doubt . . . must set this question at rest." 119 U.S. at 423. Congress has not altered those statutes (except for minor word changes in one in codification) during the century following. The first, now 18 U.S.C. § 3186,[21] provides that when this country grants extradition from the United States to a foreign country, it is for the accused "to be tried for the offense of which charged."[22] This Court in *Rauscher* reasoned that likewise in the converse situation, when a person was extradited from abroad to this country for trial, he or she is subject only to be tried for the crime for which extradited. 119 U.S. at 423-24.

Even more pertinent, the Court relied upon Rev. Stat. § 5275,[23] now codified as 18 U.S.C. § 3192, which affirms

[20] Respondent apparently was of the view that the immunity terminated upon the conclusion of the trial, but that is not so. This Court has held that the immunity, of course, extends until he is "dicharged by reason of acquittal, or conviction and compliance with sentence." *Cosgrove* v. *Winney*, 174 U.S. 64, 68 (1899); *accord*, *e.g.*, *Collins* v. *O'Neil*, 214 U.S. 113, 123 (1909); *Adamy* v. *Parkhurst*, 61 F.2d 517, 518 (6th Cir. 1932). See also 18 U.S.C. § 3192. Petitioner's sentence of probation required him to remain in the United States. J.A. 135.

[21] Act of Aug. 12, 1848, ch. 167, § 3, 9 Stat. 302, Rev. Stat. § 5272.

[22] As codified in Rev. Stat. § 5272 it read, "to be tried for the crime of which such person shall be accused." See *United States* v. *Rauscher*, *supra*, 119 U.S. at 423. There is no indication that the wording change when Title 18 was codified was intended to work any substantive change. See Holtzoff, *Preface to Title 18*, *U.S.C.A.*, 18 U.S.C.A. at xvi (1950).

[23] Act of March 3, 1869, ch. 141, § 1, 15 Stat. 337, Rev. Stat. § 5275.

a statutory protection for persons brought to this country pursuant to any of this country's extradition treaties, "until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter . . . ." This Court concluded that "[t]he obvious meaning of these two statutes" was that the person extradited "shall not be arrested or tried for any other offence than that with which he was charged in those [criminal] proceedings," and that "[t]his is undoubtedly a congressional construction of the purpose and meaning of extradition treaties" and "conclusive upon the judiciary." 119 U.S. at 423-24.[24] Accordingly, three years after *Rauscher*, it was recognized that § 3192 guaranteed immunity not only from other criminal proceedings, but that in addition the statute "makes no distinction between a civil and a criminal arrest." *In re Reinitz, supra*, 39 Fed. at 207-08.

Congress has never changed those statutes. Such an unvarying century-old and universal interpretation of Congressional enactments is entitled to respect. *Cf., e.g., Flood* v. *Kuhn*, 407 U.S. 258 (1972).

(b) *The Extradition Treaty Requires Immunity.*

The 1900 treaty under which petitioner was extradited recites in its title and twice thereafter that its purpose is "for the extradition of criminals." 31 Stat. 1928, p. 3a, *infra*. It was signed shortly after *Rauscher* and embodies the contemporary understanding, and contains in Article IX, 36 Stat. 1932, p. 6a, *infra*, the usual provision that "No person surrendered . . . shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted." The reference to "prosecuted" is unrestricted. It has not been customary in extradition treaties to deal with civil immunity more extensively, the universal understanding always being that the *Rauscher* rule governs.[25] Every authority at the time the treaty was signed agreed that this meant immunity from all other judicial proceedings, whether criminal or civil. As the leading treatise writer of the time, John Bassett Moore, explained:

> "The fugitive having been delivered up for the sole purpose of being tried for the offence with which he was charged, and the disability of the courts being jurisdictional, it follows that the prisoner is not liable to their process for civil any more than for general criminal purposes. The fugitive is not delivered up with a view to answer in civil suits in any respect." 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 272 (1891).[26]

That interpretation has been reiterated many times thereafter. See, *e.g.*, 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 239 (1942).

(c) *Common Law Recognizes an Even Broader Immunity.*

The immunity here rests also on an even broader long-established principle: that persons who enter a jurisdiction as parties or witnesses, voluntarily or involuntarily, in criminal proceedings or civil, are immune from service of process while present for that purpose. The *Rauscher* Court referred to "the recognized public law which had prevailed in the absence of treaties." 119 U.S. at 420. The principle was broadly stated by this Court in *Stewart* v. *Ramsay*, 242 U.S. 128, 129 (1916):

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[24] Justice Gray, concurring in *Rauscher*, relied entirely on this "express law." 119 U.S. at 433.

[25] The treaty in *Rauscher* was even less explicit about immunity than the treaty with Switzerland here, providing simply that the extradited person would be "deliver[ed] up to justice." Treaty of Aug. 9, 1842, with Great Britain (Webster-Ashburton Treaty), Art. X, 8 Stat. 572, 576. See also *Lascelles* v *.Georgia*, 148 U.S. 537, 542 (1893). *Cf. Potomac Elec. Power Co.* v. *Director*, 449 U.S. 268, 280 (1980): "In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once 'dominate[d] the field' is . . . enlightening . . . ."

[26] See also S. SPEAR, LAW OF EXTRADITION 557 (2d ed. 1884).

> "The true rule, well founded in reason and sustained by the greater weight of authority is, that suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going."

This rule has been applied in a variety of situations.[27] Its purpose is apparent: in situations where the foreign person appears voluntarily, not to penalize or discourage him or her from assisting the local system of justice; and in situations where, as here, appearance is involuntary, to prevent the "perverting," *Smith* v. *Government of the Canal Zone*, *supra*, of the awesome powers of the criminal process for private ends, and to ensure that extradition functions entirely "in the public interest." *President ex rel. Caputo* v. *Kelly*, *supra*.[28]

3. *Civil Immunity Serves Long Recognized Policy That Is Fully Applicable Today.*

Extradition is a system of assistance to law enforcement that depends heavily upon international cooperation. There are no practical remedies available if other countries choose not to deliver extraditable defendants. The United States is particularly dependent on the international extradition system's functioning well: this country has more extradition treaties than any other country, and the number of requests it sends out has increased significantly in recent years.[29] One can well foresee that if it came to be known that foreign defendants extradited to this country would thereby be subjected to civil suits—including suits for sums, as here, many times greater than any asserted loss—in courts where their presence never could have been obtained otherwise, then other countries might well view this as an abuse of the extradition system for private ends, and withhold or limit cooperation.

It is also apparent that applying the *Mitchell* v. *Forsyth* rule to allow appeal from the denial of this civil immunity places no real burden on the courts of appeals. The very dearth of recent cases attempting to sue extradited persons shows that such cases have been practically nonexistent—reflecting the heretofore universal understanding that this civil immunity is unquestioned.[30] To reaffirm that rule here will make it highly unlikely that the issue will arise again.

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[27] See, *e.g.*, *Alla* v. *Kornfeld*, 84 F. Supp. 823 (N.D. Ill. 1949); *Bramwell* v. *Owen*, 276 Fed. 36 (D. Ore. 1921); *Feister* v. *Hulick*, 228 Fed. 821 (E.D. Pa. 1916); *Kaufman* v. *Garner*, 173 Fed. 550 (C.C.W.D. Ky. 1909); *Shapiro & Son Curtain Corp.* v. *Glass*, 348 F.2d 460 (2d Cir.), *cert. denied*, 382 U.S. 942 (1965) (deposition witness); *Sherwin-Williams Co.* v. *American Chemical Paint Co.*, 67 F. Supp. 685 (D. Del. 1946) (deposition witness); *Youpe* v. *Strasser*, 113 F. Supp. 289 (D.D.C. 1953) (witness before congressional committee); *Sullivan* v. *Kilgore Mfg. Co.*, 100 F. Supp. 983 (E.D.N.Y. 1951) (hearing witness).

[28] Civil immunity, in fact, is an easier instance for immunity than the immunity from other criminal prosecutions that was established in *Rauscher*. The courts have always been more ready to refuse to hear civil cases brought against persons not appropriately before them. As this Court explained in *In re Johnson*, 167 U.S. 120, 126 (1897): "The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest."

[29] See Hearings on H.R. 2643 Before the Subcommittee on Crime, Committee on the Judiciary, House of Reps., 98th Cong., 1st Sess. 34 (1983). The United States also usually sends many more extradition requests than it receives. See, *e.g.*, ATTORNEY GENERAL OF THE UNITED STATES, ANNUAL REPORT 1983 at 70 (239 requests sent, 99 received).

[30] The number of potential appeals like the present one cannot be great. The United States, according to the latest published data, obtains the presence of about 50 persons by extradition each year. See ATTORNEY GENERAL OF THE UNITED STATES, ANNUAL REPORT 1983 at 70; *id.*, 1982 at 84; *id.*, 1981 at 60. Only a fraction of these are aliens. Most, of course, are not pursued by civil plaintiffs in this country.

II. SUMMARY DENIAL OF A SUBSTANTIAL CLAIM OF *FORUM NON CONVENIENS* IS APPEALABLE.

The more controversial question that this case presents is whether the denial of petitioner's motion to dismiss for *forum non conveniens* also was appealable under *Cohen* v. *Beneficial Industrial Loan Corp., supra.* Resolution of that issue is even easier in this case than it would be in some, because here the District Court did not even attempt to make the necessary findings and apply the applicable law; instead, it simply denied the motion with no hearing, no findings of fact, and no explanation at all.

A. All the Criteria of *Cohen* v. *Beneficial Industrial Loan Corp.* Are Met.

There is, first of all, no textual bar to review under 28 U.S.C. § 1291 of a *forum non conveniens* denial. As Justice Jackson, the author of *Cohen*, joined by Justice Frankfurter, pointed out in *Stack* v. *Boyle, supra*, the statute authorizes review of final "decisions"—not merely final judgments—of the district courts. 342 U.S. at 12 (concurring opinion).[31] And even in construing a similar statute that does speak in terms of review only of "final judgments or decrees"—28 U.S.C. § 1257—this Court has given it a practical reading and held that review of a dispute over venue was proper:

> "we believe that it serves the policy underlying the requirement of finality . . . to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of venue is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

Section 1291 likewise, this Court has often explained, is to be given a "practical rather than a technical construction." *Cohen, supra*, 337 U.S. at 546, as quoted also in *Richardson* v. *United States*, 468 U.S. 317, 322(1984), *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974), and *Gillespie* v. *United Steel Corp.*, 379 U.S. 148, 152 (1964).

That being so, it is appropriate to examine the "competing considerations," *Gillespie, supra*, in prompt review of *forum non conveniens* denials, and whether the tests that this Court has developed for judging the appropriateness of appeal are met. Such an analysis was undertaken in a widely cited opinion by Judge Wilkey, joined by Judge MacKinnon, in *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.) (statement in support of *en banc* review), *cert. denied*, 416 U.S. 970 (1983). His opinion was also endorsed by Justice Powell.[32] The *Nalls* opinion along with this Court's holding in *Mercantile Nat'l Bank, supra*, was also relied upon by the Fourth Circuit in announcing, with respect to *forum non conveniens* denials, "Our conclusion is that all of the requirements of the rule of *Cohen* v. *Beneficial Industrial Loan Corp.* . . . are present." *Hodson* v. *A.H. Robins Co.*, 715 F.2d 142, 145 n.2 (4th Cir. 1983); see also *Kontoulas* v. *A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

The three *Cohen* requirements reiterated in *Coopers & Lybrand* v. *Livesay, supra*, are indeed fully satisfied when a *forum non conveniens* motion is denied, and so are the policies they reflect:

(1) *Conclusive determination.* Even the courts of appeals that have declined to hold *forum non conveniens* orders generally appealable all have recognized that the first of the *Cohen* criteria is met: the disputed issue has been "conclusively determined." *Carlenstolpe* v. *Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987). "The denial of the *forum non conveniens* motion satisfies the first crite-

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[31] "We know, of course, that § 1291 does not limit appellate review to 'those final judgments which terminate an action . . . .'" *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974), *quoting in part Cohen, supra*, 337 U.S. at 545.

[32] Justice Powell dissented from denial of certiorari in that case "for reasons similar to those stated by Judge Wilkey." Justice Blackmun also noted his dissent from denial of certiorari. *Rolls-Royce Ltd.* v. *Nalls*, 461 U.S. 970 (1983).

rion . . . ." *Partrederiet Treasure Saga* v. *Joy Mfg. Co.*, 804 F.2d 308, 309 (5th Cir. 1986); see also *Rosenstein* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352, 354 (6th Cir. 1985); *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983).

(2) *Completely separate from the merits.* A *forum non conveniens* determination does not require a minitrial of the case. It is certainly no more enmeshed with the merits than is a determination whether to reduce bail, held appealable in *Stack* v. *Boyle*, *supra*, or a double-jeopardy claim, held appealable in *Abney* v. *United States*, *supra*, and in *Richardson* v. *United States*, *supra*, the latter even when it "would require the appellate court to canvass the sufficiency of the evidence at the first trial." 468 U.S. at 322. A *forum non conveniens* determination depends simply upon balancing a limited number of specific, familiar and clearly identifiable factors, listed by this Court in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 n.6 (1981), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-09 (1947). They seldom require particularized testimony or discovery to provide a sufficient basis for the district court to weigh them. Nearly always, as here, affidavits are quite sufficient. See, *e.g.*, *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987); *Alcoa S.S. Co.* v. *M/V Nordic Regent*, 654 F.2d 147, 158-59 (2d Cir. 1980) (*en banc*); *cf. Koster* v. *(American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 526 (1947).

"[A] motion to dismiss for *forum non conveniens* does not call for a detailed development of the entire case," and insofar as it involves facts, "is limited to the location of important sources of proof." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 451 n.3 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). The *forum non conveniens* situation is quite different from, for example, that of claims of speedy-trial violations, which, this Court observed, depend on showings of prejudice difficult to "be accurately measured before trial" and which "are best considered

only after the relevant facts have been developed at trial." *United States* v. *MacDonald*, 435 U.S. 850, 858, 859 (1978). As the Eleventh Circuit also explained, it is "not a decision going to the character and result of the controversy." *Sibaja* v. *Dow Chemical Co.*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985). "[D]etail is not necessary" and "[r]equiring extensive investigation would defeat the purpose of . . . [the] motion." *Piper Aircraft Co.* v. *Reyno*, *supra*, 454 U.S. at 258.[33]

(3) *Effectively unreviewable on appeal from final judgment.* The third criterion is a practical one. Judge Wilkey's opinion in *Nalls* explained:

> "*Third*, the district court's decision is effectively unreviewable on appeal from the final judgment on the merits. The rights conferred by *forum non conveniens* law—the right not to be tried in an unreasonably inconvenient forum—will be effectively extinguished if review is postponed. Perhaps the closest analogy would be to a district court's denial of a motion to dismiss on double jeopardy grounds. As the Supreme Court held in *Abney* v. *United States*, the right conferred by the double jeopardy clause—the right *not to stand trial* a second time for the same offense—is effectively denied when the trial proceeds, regardless of its outcome. Similarly, as the Court notes in *Abney*, the *Cohen* case—which established the collateral order doctrine—can be interpreted to hold that at stake there was the right of the corporation *not to stand trial at all* unless the shareholder suing derivatively posted security for defendant's cost of litigation. Such a right not to stand trial is at issue in the present appeal. *After the trial is*

[33] By contrast, decisions as to counsel disqualification often require subsequent evaluation of prejudice demonstrated on the trial record. See *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438-39 (1985); *Flanagan* v. *United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981). They also fail the third *Cohen* test of later unreviewability. See also *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 267 (1982) (vindictive prosecution); *United States* v. *MacDonald*, 435 U.S. 850 (1978) (speedy trial).

concluded, all the expenses and burdens of trial in the unconvenient forum have already been incurred. To delay review until a final judgment is entered is to deny review altogether." 702 F.2d at 260 (footnotes omitted; emphasis in original except final emphasis supplied).

A recent Second Circuit opinion, while acknowledging that "this argument has some force," gave greater weight to the danger of prolonging litigation and associated expense. *Carlenstolpe* v. *Merck & Co.*, *supra*, 819 F.2d at 36.[34] Potential delay, weighed against the benefits from terminating suits improperly commenced in U.S. courts, is indeed one of the competing policy concerns that are present in any *Cohen* situation. See *Gillespie* v. *United States Steel Corp.*, *supra*, 379 U.S. at 152-53. It is always a matter of balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted). The criteria of *Cohen* and *Coopers & Lybrand* provide an orderly and workable framework for reaching the proper determination as to appealability. The ever-present arguments against review of any collateral order do not in any way avoid the fact that when a *forum non conveniens* motion is denied, the third *Cohen* criterion is plainly met: after a final judgment, an appellate court is not going to go back and undo it and order the case to start all over again in another country. In the real world, review comes now or never.

Empirical evidence confirms what common sense suggests. With the assistance of a computerized data bank, counsel have examined every reported *forum non conveniens* decision in the courts of appeals for the past

[34] The author of the Second Circuit's *Carlenstolpe* opinion cited cases in which he expressed in separate opinions his disagreement with the *forum non conveniens* doctrine itself, and his view that "the entire doctrine of forum non conveniens should be reexamined." *Overseas National Airways, Inc.* v. *Cargolux Airlines International, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring).

fifty years, covering the entire *Federal Reporter, Second Series*. In all of these hundreds of decisions, only *six* have been found in which a court of appeals after trial and final judgment even considered on appeal a district court's pretrial refusal to grant a *forum non conveniens* motion.[35] In four of those six cases, moreover, the courts of appeals frankly stressed that the fact a trial had already occurred strongly influenced them not to reconsider the forum issue.[36] In only *one* case in fifty years has the *forum non conveniens* denial been reversed on appeal after trial in the district court, and there reluctantly, expressing regret over the waste of resources that had occurred.[37]

After deciding in 1986 not to hear appeals from denials of *forum non conveniens* motions under 28 U.S.C. § 1291, *Partrederiet Treasure Saga* v. *Joy Mfg. Co.*, *supra* (while acknowledging that "we recognize that strong countervailing arguments can be made," 804 F.2d at 310), the Fifth Circuit has already had occasion twice since then to express unhappiness about the practical consequences of that result. In *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987) (*en*

[35] *Hopson* v. *Hopson*, 221 F.2d 839 (D.C. Cir. 1955); *Conte* v. *Flota Mercante*, 277 F.2d 664 (2d Cir. 1960); *Fisher* v. *The Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *reh. denied*, 636 F.2d 1107 (1981); *Szumlicz* v. *Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987), *pet'n for cert. pending*, No. 87-750; *Gonzalez* v. *Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987).

[36] See *Hopson* v. *Hopson*, *supra*, 221 F.2d at 842-43 ("To refuse to exercise jurisdiction at this late date . . . would, we think, be unduly harsh and unjust"); *Conte* v. *Flota Mercante*, *supra*, 277 F.2d at 667 (referring to already "expended time and money"); *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d at 1167 ("The fact that a trial on the merits has occurred . . . does have some effect in our decision . . . ."); *Gonzalez* v. *Naviera Neptuno A.A.*, 832 F.2d at 881 ("the fact that a trial on the merits has occurred is a factor meriting consideration").

[37] *Gonzalez* v. *Naviera Neptuno A.A.*, *supra*, 832 F.2d at 881.

banc), *pet'n for cert. pending*, No. 87-750, it observed that

> "the practice of carrying a motion to dismiss for forum non conveniens through trial frustrates the doctrine's overall purpose of avoiding unnecessary costs and inconvenience." *Id.* at 1167 n.35.

And in *Gonzalez* v. *Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987), the court again noted the dilemma in which lack of earlier review placed it. Urging that denials of *forum non conveniens* motions *should* receive immediate review, the court now has twice invited the district courts in that circuit to certify them for appeal under 28 U.S.C. § 1292(b).[38]

That is not a satisfactory solution, however. The pattern in *forum non conveniens* cases has been for district courts routinely to deny such requests. The Fifth Circuit's own experience so illustrates. See, *e.g.*, *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d at 1152; *Gonzalez* v. *Naviera Neptuno A.A.*, *supra*, 832 F.2d at 881; see also, *e.g.*, *Carlenstolpe* v. *Merck & Co.*, *supra*, 819 F.2d at 35. It is simply not satisfactory to make meaningful appellate review entirely dependent on certification by the very district judge who entered the order complained of, and who has already found dismissal inappropriate. Moreover, although on a few occasions such certified appeals have been heard,[39] it is

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Counsel bringing appeals recognize the same practical reality, and given that an appellate court cannot be expected to consider more than a few issues from a trial below, counsel most often will wisely abandon on appeal any pretrial *forum non conveniens* claim. *Cf.*, *e.g.*, *Gulf Trading & Transp. Co.* v. *Vessel Hoegh Shield*, 658 F.2d 363, 365 n.1 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

[38] See *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d at 1167 n.34 ("We, of course, will remain receptive to receiving certifications" under 28 U.S.C. § 1292(b)); *Gonzalez* v. *Naviera Neptuno A.A.*, *supra*, 832 F.2d at 881 ("we would add that trial judges should be hospitable to applications for Interlocutory Appeals under 28 U.S.C. § 1292(b)").

[39] See *Friends for All Children, Inc.* v. *Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983); *De Oliviera* v. *Delta Marine Drilling Co.*, 684 F.2d 337 (5th Cir. 1982), *on rehearing*, 707 F.2d 843 (5th Cir. 1983).

not even clear that all *forum non conveniens* cases fit the certification statute, 28 U.S.C. § 1292(b), which requires *inter alia* that the issue appealed be "a controlling question of law."

Mandamus is no solution, either. Mandamus is not a satisfactory alternative to appeal to correct errors of law. *Helstoski* v. *Meanor*, 442 U.S. 500, 505 (1979). In many circuits it is simply not available, because of the discretionary aspects of most *forum non conveniens* rulings. See *Carlenstolpe* v. *Merck & Co.*, 819 F.2d 33, 35 (2d Cir. 1987). It, too, is routinely denied in such cases.[40] In the present case, indeed, believing that the District Court's failure to make any findings or provide any explanation at all placed the case in the category of failure to exercise a clearly mandated judicial function, petitioner applied alternatively for mandamus. J.A. 229. But the Court of Appeals simply ignored the request, and

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[40] Some courts of appeals have said that they might grant mandamus to require dismissal on grounds of *forum non conveniens*. *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972). No case has been found in which mandamus has been granted in such a situation, although there are a few in which it was sought and denied. See *Gonzalez* v. *Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987); *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d at 1152; *Castanho* v. *Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981); *Thompson* v. *Palmieri*, 355 F.2d 64 (2d Cir. 1966); *Morehead* v. *Barksdale*, 263 F.2d 117 (4th Cir. 1959). See also *In re McClelland Engineers, Inc.*, 742 F.2d 837 (5th Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985) (remanding with request to certify under 28 U.S.C. § 1292(b)). If mandamus is ever available, the District Court's total ignoring of the legal requirements should have made it appropriate when alternatively requested by petitioner here. See *Castanho* v. *Jackson Marine, Inc.*, *supra*, 650 F.2d at 550; *Carlenstolpe* v. *Merck & Co.*, *supra*, 819 F.2d at 35. *But cee Gonzalez*, *supra*, in which the Fifth Circuit explained that it had earlier denied mandamus because it could not tell what the basis for the district court's action had been, because of "the total absence of reasons why the judge did what he did." 832 F.2d at 881.

dismissed the appeal without mentioning mandamus at all.[41]

In *Coopers & Lybrand*, moreover, this Court in holding class-action denials not appealable gave some weight to the observation that immediate appeal of such orders would there have created an asymmetry: because orders *granting* class certification were not appealable, "the doctrine operates only in favor of plaintiffs even though the class issue . . . will often be of critical importance to defendants as well." 437 U.S. at 476. In the *forum non conveniens* situation, symmetry and fairness argue in favor of, rather than against, appealability. A *dismissal for forum non conveniens* ends the U.S. case and is always appealable. Unless *refusals to dismiss for forum non conveniens* receive the same treatment, plaintiffs will be effectively favored over defendants, with rulings in plaintiffs' favor left effectively unreviewable. Such a favoring of foreign plaintiffs' choice of forum would be particularly inappropriate because by hypothesis it is plaintiffs who will be imposing on U.S. courts with the suits that ought to be sent elsewhere.

B. A Summary Denial Particularly Calls for Prompt Review.

Here the District Court issued a ruling that did not simply reach a questionable balance of factors as an exercise of discretion. Rather, it failed to make any of the findings required for ruling on *forum non conveniens* motions. It simply brushed a substantial *forum non conveniens* claim carelessly aside.

This Court in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257-60 (1981), as it had in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), made clear that the law requires a district court in such a situation carefully to

[41] Ninth Circuit practice is to grant mandamus as an alternative to appeal where appropriate. See *Hartland* v. *Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976); *Shapiro* v. *Bonanza Hotel Co.*, 185 F.2d 777, 779 (9th Cir. 1950).

weigh all the public and private factors bearing on appropriate forum, and make findings adequate for appellate review. Even though district courts enjoy some latitude in deciding *forum non conveniens* motions, they commit facially apparent reversible error if, as here, they simply summarily deny such motions out of hand:

> "We can say with certainty that a district court abuses its discretion when it summarily denies or grants a motion to dismiss without either written or oral explanation. We can also state that a district court abuses its discretion when it fails to address and balance the relevant principles and factors of the doctrine of forum non conveniens." *In re Air Crash Disaster Near New Orleans, supra*, 821 F.2d at 1166.

Here the District Court ignored that duty completely. It performed no discernible analysis. It offered no reasoning. And it made no findings at all, even though the Court of Appeals for its Circuit has previously stated exactly what analysis and findings are necessary in *forum non conveniens* cases. *Nebenzahl* v. *Credit Suisse*, 705 F.2d 1139 (9th Cir. 1983).

Appellate review of such an extreme violation is not a lengthy or complex process. The District Court's failure was *per se*, automatic reversible error. See *Nebenzahl* v. *Credit Suisse, supra; Pereira* v. *Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *cert. dismissed*, 475 U.S. 1040 (1986); *In re Air Crash Disaster Near New Orleans, supra*, 821 F.2d at 1166 n.32; *DeShane* v. *Deere & Co.*, 726 F.2d 443, 446 (8th Cir. 1984), *id.*, 747 F.2d 1194 (8th Cir. 1984); *C.A. La Seguridad* v. *Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983); *Macedo* v. *Boeing Co.*, 693 F.2d 683 (7th Cir. 1982); *Union Ins. Soc'y* v. *S.S. Elikon*, 642 F.2d 721, 725 (4th Cir. 1981); *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 784-85 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Piper Aircraft Co.* v. *Reyno, supra*. Certainly a denial of a *forum non conveniens* motion should be promptly appealable where, as here, the District

Court's action was invalid on its face. Its failure to give any explicit consideration at all to any of the *forum non conveniens* factors is analogous to the flat denial of the existence of an immunity from suit held appealable in *Mitchell* v. *Forsyth*, *supra*.

C. Prompt Review Does Not Burden the Courts of Appeals, and Reduces Inappropriate Litigation.

"As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs. Ltd.* v. *Bloch*, [1983] 2 A11 E.R. 72, 74 (C.A.) (Lord Denning, M.R.), quoted in part in *Nicol* v. *Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 290 (5th Cir. 1984). This Court not long ago had occasion to refer to "[t]he American courts, which are already extremely attractive to foreign plaintiffs," and to warn of "[t]he flow of litigation into the United States" that threatens to "further congest already crowded courts." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 (1981).[42] See also *Coakes* v. *Arabian American Oil Co.*, 831 F.2d 572 (5th Cir. 1987) (affirming dismissal in spite of argument that U.S. contingent-fee system would not be available in courts abroad); *Sigalas* v. *Lido Maritime, Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985) (referring to "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland"). "Admittedly the United States forum is a generous arena,

[42] The Central District of California, where respondent sued, is the second busiest federal district in the country. The case load per judge is 650. See ADMIN. OFFICE, U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 129 (1987). "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *Douglas* v. *New York, N.H. & H.R.R.*, 279 U.S. 377, 387 (1929) (Holmes, J.); *cf. Perez & Cia.* v. *M/V Mexico I*, 826 F.2d 1449, 1452 (5th Cir. 1987) (affirming dismissal for *forum non conveniens*): "Moreover, courts in Houston are severely congested, which indicates that a matter of no local concern should not be tried there . . . ."

that of course is one reason why it is a popular forum for litigants."[43] *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d at 1170 n.38.

This Court also has warned against "a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). It has cautioned that "[a]dministrative duties follow for courts when litigation is piled up in congested centers instead of at its origin," and that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. at 508-09. The role of *forum non conveniens* in part is to offset the power of modern plaintiffs to forum-shop and distort the location of litigation. As Professor Bickel wrote:

> "In modern times he [the plaintiff] has been largely freed of rigid venue restrictions, and been given an area of discretion so wide that, in the judgment of many commentators, he is able to abuse it. . . . [P]laintiffs often overcrowd the dockets of a small number of popular courts. . . ." Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. Q. 12, 14-15 (1949).

In the present case, for example, respondent after receiving back only $800,000 of the $1,000,000 he had lent was awarded restitution by the criminal court totalling $200,000, of which the portion allocated for petitioner to pay was only $34,501.26. A judgment for restitution, however, was not enough to satisfy respondent, who brought this civil suit in a U.S. court to recover damages

[43] See also, *e.g.*, *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 797 n.130 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 844 n.1 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199 (1987); *Noto* v. *Compania Secula di Armanento*, 310 F. Supp. 639, 650 (S.D.N.Y. 1970) ("flooded . . . dockets with litigation that truly belongs in another forum").

of $600,000 based on his expected interest rate of 20% per annum, asked further to have the amount then trebled under the RICO statute, and further to pile on millions of dollars of punitive damages as well, for a sum totalling over $19,000,000. See J.A. 21-23. The phenomenon is becoming common:

> "Indeed, plaintiffs appear to be very anxious to travel thousands of miles and to transport witness and documents to a distant forum, New York, despite the opportunity for adjudication in the Philippines, their home forum and the only place they do business. One explanation may be that plaintiffs envision their RICO claim as a powerful force .... It is noted that plaintiffs' lengthy complaint makes free-wheeling allegations under RICO and converts a relatively simple breach of contract and fraud action into a complex one." *Transunion Corp.* v. *Pepsico, Inc.*, 640 F. Supp. 1211, 1217 (S.D.N.Y. 1986) (Weinfeld, J.) (dismissing for *forum non conveniens*), *aff'd*, 811 F.2d 127 (2d Cir. 1987).

Meaningful appellate review of *forum non conveniens* rulings is an effective way to be sure that district courts are properly scrutinizing foreign-centered claims. The volume of appeals resulting from review of denials of *forum non conveniens* motions cannot be great. The doctrine in the federal courts now is confined as a practical matter to suits in which the alternative forum is in another country. Cases where the more convenient forum is in the United States are handled instead under the venue-transfer provisions of 28 U.S.C. § 1404(a), which was enacted in 1948, shortly after the *Gulf Oil Corp.* decision.[44] There is no evidence that the Fourth Circuit, which has recognized appealability of *forum non conveniens* denials for several years, has been swamped; indeed, there are only two such Fourth Circuit cases reported. *Kontoulas* v. *A.H. Robins Co.*, 745 F.2d 312

[44] In extremely rare instances, *forum non conveniens* may be used when the more appropriate forum is a state court. See *Mission Ins. Co.* v. *Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983).

(4th Cir. 1984); *Hodson* v. *A.H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983).[45]

D. The U.S. Forum Here Was Clearly Inappropriate.

Although neither of the lower courts performed the analysis of public and private factors required by *Gulf Oil Corp* v. *Gilbert* and *Piper Aircraft Co.* v. *Reyno, supra*, for *forum non conveniens* determinations, there is no need to remand for that purpose. The record is very simple, undisputed, and overwhelmingly demonstrates the inconvenience of a U.S. court and the appropriateness of a Belgian forum. This is another case in which, "in response to defendant's motion and supporting affidavits, which *prima facie* established vexation to defendant and the inappropriateness of the court, the plaintiff shows not a single fact provable by record or witness within the district or state where he has brought suit." *Koster* v. (*American*) *Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 526 (1947). This Court has an adequate record to rule, as it did in *Piper Aircraft Co.* v. *Reyno, supra*, holding that "our consideration of these issues is not inappropriate." 454 U.S. at 247 n.12.

What is at stake here is not remitting a plaintiff to some alien land to present his case in an unfamiliar tribunal. Nothing more will happen here than that two

[45] Section 1404(a) grants to district courts a discretion greater than the *forum non conveniens* standard. See *Piper Aircraft Co.* v. *Reyno, supra*, 454 U.S. at 253. For that much more frequently arising situation, when the only issue is which United States District Court shall hear the case, reliance on the essentially unreviewable discretion of the district judge involves much lower stakes, less potential inconvenience, and no change in the overall burden on the federal courts, and so disallowance of immediate appeal of right is entirely appropriate. Moreover, there is symmetry, because § 1404(a) grants as well as denials are not appealable. See *Piper Aircraft Co.* v. *Reyno, supra*, 454 U.S. at 253. "In particular, several of the differences between section 1404(a) and *forum non conveniens* suggest that denial of the latter should be appealable even though denials of the former are not." *Nalls* v. *Rolls-Royce Ltd., supra*, 702 F.2d at 261 (statement of Wilkey and MacKinnon, JJ.).

A. Petitioner Has No Immunity from Civil Process.

1. The case law dealing with extradition does not support petitioner's claim of "immunity."

Petitioner's principal argument is summed up in the astonishing statement that "there has never been a doubt expressed since [*Rauscher*] was decided in 1886 that an extradited person is to be free from any judicial interference in this country, except of course the criminal prosecution for which he was brought here" (Br. 18, footnote omitted). The reality, though, is that this Court has never even intimated that a person who has been convicted in this country following extradition could not be served with a summons in a civil case, and petitioner has not located a single decision in the last 70 years in which an extradited person was held to be exempt from civil process.

In *Rauscher* a seaman was extradited from Great Britain on a charge of murder on the high seas but was indicted for a different crime which was not an extraditable offense under the treaty of 1842 between the United States and Great Britain. Applying "the general principle that the specific enumeration of certain matters and things implies the exclusion of all others," 119 U.S. at 429, this Court ruled that a person extradited under a treaty that enumerated certain crimes could not be charged with committing other non-enumerated offenses. Thus, on its face, *Rauscher* simply dealt with the criminal law principle of "specialty" and did not in any way confront the question whether the extradited person could be served with civil process. Indeed, the Court itself emphasized that distinction. *See id.* at 432.

An examination of the doctrinal underpinnings of specialty reveals why it is inapplicable to private civil process. The traditional reluctance of nations to extradite accused persons was overcome only with the advent of extradition treaties. *See Rauscher,* 119 U.S. at 426. Nations were hesitant about entering into treaties because they feared they would be forced to extradite persons who were accused of acts that either were not illegal in the asylum state or were political offenses. *See Fiocconi v. Attorney General,* 462 F.2d 475, 481 (2d Cir.), *cert. denied,* 409 U.S. 1059 (1972). To avoid this situation, extradition treaties typically enumerate extraditable offenses and stipulate that an offense is not extraditable unless it is a crime in both countries (the doctrine of double criminality).[23] The principle of specialty evolved as a mechanism to ensure that nations did not evade restrictions on enumerated offenses and double criminality by extraditing a person for one crime and then charging him with another. *See* 1 M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 360 (2d ed. 1987).

The interests protected by the specialty rule are not jeopardized by permitting a private litigant to serve civil process on an extradited person. Allowing such service does not raise the spectre that the crushing power of the state may be used to imprison or execute someone for conduct that the asylum state might not have found objectionable. Indeed, such an unwarranted extension of the specialty principle to process in civil proceedings would bestow a privilege on a rather undeserving class of persons: convicted felons who happen to have been extradited.

Moreover, petitioner could derive no comfort from such an expansion of the doctrine of specialty because, as discussed above, Switzerland is wholly indifferent about whether a summons is served upon him. In *Fiocconi,* 462 F.2d at 481, the Second Circuit, in an opinion by Chief Judge Friendly, held that it would not apply the principle of specialty to persons extradited from Italy on narcotics charges who were then indicted on other narcotics charges "in the absence of any affirmative protest from Italy." Similarly, in *United States v. Molina-Chacon,* 627 F. Supp. 1253, 1264 (E.D.N.Y. 1986), *aff'd sub nom. United States v. DiTommaso,* 817 F.2d 201, 212 (2d Cir. 1987), the

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[23] That, of course, is true of the Swiss treaty at issue here. *See* Article II (Petn'r Br. Apdx. 4a-5a).

court found that the doctrine of specia'y was inapplicable in the absence of an objection by the asylum state.

None of the antiquated lower court cases relied on by petitioner held that a person extradited from a foreign country to the United States has any "immunity" from ordinary civil process, and none of them mandate the conclusion that such an "immunity" should be recognized here.[24] *In re Reinitz,* 39 F. 204 (C.C.S.D.N.Y. 1889), is irrelevant because it involved immunity from civil *arrest,* not the mere service of process — without detention — that is involved in the instant case. Significantly, this Court has specifically held that a grant of immunity from arrest does not necessarily apply to service of civil process. *See Long v. Ansell,* 293 U.S. 76 (1934) (privilege granted senators and representatives from arrest does not apply to service of civil process).

In re Baruch, 41 F. 472 (C.C.S.D.N.Y. 1890), also involved an arrest. It is further distinguishable because the defendant was found in New Jersey, transported to New York to consider a request to extradite him to Austria, and subjected to civil arrest in New York after a decision was made not to extradite him. In *Smith v. Government of Canal Zone,* 249 F. 273 (5th Cir. 1918), the court found that extradition had been used as a sham to secure the presence of the defendant and stated in the remainder of the very sentence truncated by petitioner (Br. 19): "with the object of having the extradited person subjected to a civil liability, instead of being tried for the crime with which he was charged." *Id.* at 279. Here, in total contrast, a summons was served only after petitioner had been tried, convicted and sentenced on the criminal charges for which he was extradited.

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[24] Petitioner further attempts to obfuscate the lack of precedent supporting his position by citing five other cases decided by this Court in the *Rauscher* era (Br. 17-18). None of these cases was even marginally concerned with whether a person extradited from a foreign country could be served with civil process.

United States ex rel. Donnelly v. Mulligan, 74 F.2d 220 (2d Cir. 1934), concerned whether someone extradited from France could then be re-extradited to Canada.[25] *Blumen v. Haff,* 78 F.2d 833, 835 (9th Cir.), *cert. denied,* 296 U.S. 644 (1935), was a deportation case dealing with the re-arrest of persons who had been extradited, tried and convicted. Finally, *President ex rel. Caputo v. Kelly,* 92 F.2d 603 (2d Cir. 1937), *cert. denied,* 303 U.S. 635 (1938), addressed whether an assistant French consul had the authority to begin extradition proceedings.

The policy underpinnings of *Rauscher* and the specialty doctrine simply do not pertain to the case at bar. Petitioner was neither charged with a non-extraditable criminal offense nor subjected to civil arrest. He was served with a summons which required him to appear through an attorney and file an answer to the complaint. He was not detained in any sense of the word. But for the conditions of his probation, he would have been free to leave the United States immediately.

2. Neither the extradition statutes nor the applicable treaty exempts petitioner from service of process.

Petitioner's reliance on two federal statutes (Br. 21-22) is totally unfounded. Neither deals either explicitly or implicitly with service of process on a person extradited to the United States. The first of these statutes, 18 U.S.C. §3186, applies on its face only to cases in which a foreign nation requests that the United States apprehend someone. The other, 18 U.S.C. §3192, is basically a grant of power to the President "to take all necessary measures for the transportation and safekeeping" of any person "delivered by any foreign government to an agent of

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[25] Petitioner's quotations from *Smith* (Br. 19) and *Donnelly* (Br. 20) are, to be charitable, incomplete. The complete sentence in *Donnelly* actually reads: "*If* a prisoner may not be subject to arrest on civil process after extradition from a foreign country (*In re Reinitz, supra),* by the same reasoning he cannot be arrested and held for extradition (not a criminal offense) to a third country." 74 F.2d at 223.

the United States" for the purpose of being tried for a criminal offense.

Although prior versions of these statutes helped provide a basis for the Court's rationale in *Rauscher,* the opinion in that case, as noted above, does not even suggest that it or these statutes restrict the service of civil process on a person who has been extradited. The *Rauscher* Court's citation of the ancestors of these provisions does not justify misreading them or extending them beyond their plain meaning.

Petitioner's claim that the treaty under which he was extradited bars service of civil process on him (Br. 22-23) is equally untenable. The treaty is utterly silent on the subject of civil process, and petitioner cites no authority for his *ipse dixit* that "[i]t has not been customary in extradition treaties to deal with civil immunity more extensively . . . ." (Br. 22). In fact, when contracting nations have desired to interdict some form of civil process on persons who have been extradited, they have specifically done so. Thus, the Treaty Respecting Extradition, Feb. 15, 1939, United States-Monaco, art. VII, 54 Stat. 1780, 1786, T.S. No. 959, provides that "no person shall be arrested or *detained by civil process* for a cause prior to the extradition." *See also* Treaty of Extradition, Jan 6, 1909, France-United States, art. VII, 37 Stat. 1526, 1531, T.S. No. 561, quoted in *United States ex rel. Donnelly v. Mulligan,* 74 F.2d at 221. Pursuant to the principle of *expressio unius* used in *Rauscher,* the specific statement of "specialty" for criminal prosecutions contained in Article IX of the extradition treaty with Switzerland should be read as reflecting a deliberate decision *not* to foreclose private civil actions.

In quoting the language of Article IX of the treaty, petitioner seeks to turn it on its head by emphasizing that the reference to "prosecuted" is unrestricted (Br. 22). Petitioner's insistence that the word "prosecuted" includes civil actions is not only at war with common usage but is also refuted by this Court's ruling, just two years after *Rauscher* (and twelve years before the

signing of the treaty with Switzerland), that "prosecution" "usually denotes a criminal proceeding." *United States v. Reisinger,* 128 U.S. 398, 403 (1888) (quoting *United States v. Ulrici,* 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594)).

Petitioner also urges that "[e]very authority at the time the treaty was signed agreed that [the treaty's prohibition that surrendered persons would not be 'prosecuted' for other crimes] meant immunity from all other judicial proceedings, whether criminal or civil" (Br. 23). Yet the person whom petitioner in the very next sentence calls "the leading treatise writer of the time" wrote, some five years after *Rauscher* and before the revised treaty with Switzerland was signed in 1900, that "where there has been no abuse of process, and neither force nor fraud, the courts have often held that civil actions could be maintained [against a person who has been extradited]. The question has never been before the Supreme Court of the United States for adjudication, and cannot be regarded as finally determined." 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 260 (1891).[26]

3. There is no settled common law exemption from service of process applicable to petitioner.

Petitioner is unable to cite a single case in which a convicted felon on probation was held to be exempt from civil process. This should come as no surprise, since the limited common law exemption from civil process does not apply in such a situation. "The general rule [is] that witnesses, suitors, and their at-

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[26] Petitioner's reliance on 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 239 (1942), is also unavailing. That "digest" relies on exactly one judicial decision, *Smith v. Government of Canal Zone,* 249 F. 273, which is unpersuasive and wide of the mark for the reasons previously discussed. And petitioner's citation of S. SPEAR, LAW OF EXTRADITION 557 (2d ed. 1884) (Br. 23 n.26) is even farther afield. The cited page, which does not consider the issue of whether an extradited person can be served with civil process, is part of a discussion of interstate, not international, extradition.

torneys, *while in attendance in connection with the conduct of one suit* are immune from service of process in another [suit]." *Lamb v. Schmitt,* 285 U.S. 222, 225 (1932). This Court in *Lamb* explained that the philosophy underlying the general rule is that:

> ". . . the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation." *Id.*

We are at a loss to fathom how service of process on a convicted felon after the conclusion of his criminal trial could in any way be construed as inconveniencing or interfering with the court.[27] Professors Wright and Miller have noted that: "Logically it seems that the purpose of granting immunity — promoting the convenience of the court — is not furthered when a person's appearance is not voluntary. Thus, the better view is one that denies immunity in these circumstances . . . ." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1081, at 513-14 (2d ed. 1987). *Accord, Lamb,* 285 U.S. at 226 (service of process is appropriate when "the service was made on one whose attendance was not voluntary, and hence had no tendency to interfere with judicial administration"); *Greene v. Weatherington,* 301 F.2d 565 (D.C. Cir. 1962) (service of process valid on nonresident defendant in a cell awaiting release on bond); *Employers Mutual Liability Ins. Co. v. Hitchcock,* 158 F. Supp. 783 (E.D. Mo. 1958) (nonresident defendant not exempt from service of process while in court on a criminal indictment).

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[27] *See Employers Mutual Liability Ins. Co. v. Hitchcock,* 158 F. Supp. 783, 785 (E.D. Mo. 1958) ("What effect could the civil suit have upon the criminal proceedings in which the defendant was compelled to appear? The answer is, absolutely nothing").

In sum, there is no basis in law or in history for petitioner's claim that the service of process on him in this case was invalid.

B. The Trial Court Did Not Abuse Its Discretion in Rejecting Petitioner's *Forum Non Conveniens* Motion.

If this Court should reach the merits of the *forum non conveniens* issue, it is obligated by established authority to pay substantial deference to the trial court's resolution of this question and to reverse that ruling only for an abuse of discretion. *Piper Aircraft,* 454 U.S. at 357. The question is not whether the trial judge elaborated his thought process articulately but, rather, whether he reached a permissible result.

At the threshold, a key factor militating against petitioner's forum relocation proposal was that he was only one of five defendants, the rest of whom were local residents who did not express dissatisfaction with respondent's venue selection. The five defendants jointly participated in the sting in Los Angeles in which respondent was bilked out of $1,000,000. Petitioner's co-defendants almost surely could not be sued in Belgium, while petitioner contends, albeit incorrectly, that he could *only* be sued in Belgium.[28] To dismiss respondent's claim against petitioner on *forum non conveniens* grounds would reward petitioner for his skulduggery, would fractionate a single claim, and would intolerably complicate and delay respondent's efforts to recoup his substantial losses.

Absent compelling reasons that do not exist here, a single lawsuit should obviously not be divided into separate actions and tried separately in the courts of different nations. That sort of bifurcation creates not only the necessity of two different, expensive trials but also the possibility of inconsistent results.

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[28] By contrast, in *Piper Aircraft* the air crash in question occurred in Scotland and both defendants had agreed to submit to the jurisdiction of the Scottish courts and to waive the statute of limitations. 454 U.S. at 242.

Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1142 (5th Cir. 1984). Federal policy encourages efficient joinder in multi-party cases. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 66 (4th Cir. 1965).

We have already adverted to the relevant *forum non conveniens* factors as set forth by this Court in *Gulf Oil,* 330 U.S. at 508, which include: (1) The relative ease of access to sources of proof; (2) the availability of witnesses; (3) the advantages and obstacles to a fair trial; and (4) practical problems that make trial of the case particularly easy, inexpensive and expeditious. All those factors dictate that the trial court did not abuse its discretion in denying petitioner's *forum non conveniens* motion.

Since the predicate acts underlying respondent's RICO claim occurred in California, much of the proof and many of the witnesses relevant to those acts are in California. Another RICO action against the same defendants and arising out of a related fraudulent scheme is also currently pending in the Central District of California. *Brasserie Belle-Vue v. Blair,* No. CV86-1719 JSL. The FBI agents who investigated the fraudulent transaction are employed in the Los Angeles office of the FBI, and most of the evidence that establishes the pertinent facts is currently in the custody of the clerk's office in Los Angeles. Application of the first two *Gulf Oil* factors therefore confirms the suitability of respondent's chosen forum and supports the trial court's pretrial analysis and disposition of the *forum non conveniens* motion.[29]

As we observed in our jurisdictional discussion, most *forum non conveniens* analyses, like the district court's here, are necessarily hypothetical because they are made before the actual

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[29] Although petitioner relied below on the fact that several of his witnesses at the criminal trial were from Belgium, that is irrevelant here, as those witnesses offered no evidence on the substance of the transaction but merely attested to petitioner's character. Such evidence would not even be admissible in the civil case. Fed. R. Evid 404.

trial occurs. For this reason, the Fifth Circuit in *In re Air Crash Disaster* expressed some comfort in being able to adjudicate such a motion on a plenary record after judgment. Similar considerations are present here and take the guesswork out of the decision-making process. It is no longer necessary to speculate about what might happen at a trial of this case since respondent has already been awarded summary judgment. There was and will be no imposition upon the trial court or on the citizenry of Los Angeles. Moreover, *Gulf Oil* also requires the court to consider "the enforceability of any judgment that might be obtained." 330 U.S. at 508. This factor, too, points to Los Angeles because respondent can obtain at least partial satisfaction from the stock he has attached, after the proceeds are applied against the restitution order.

That portion of *Gulf Oil* prescribing examination of the "practical problems" that might make the trial "easy, inexpensive and expeditious" is particularly apposite here and further confirms the soundness of the district court's conclusion. Even in the absence of the existing summary judgment, the facts of this case would not require the trial court to flounder in foreign laws or to decipher arcane conflict of laws principles. Quite the opposite is true. Because of petitioner's criminal conviction, the present civil case was almost guaranteed to move quickly and efficiently to judgment by application of the American doctrines of *res judicata* and collateral estoppel. It would be wasteful and unnecessary to transfer this case to a Belgian court for a consideration of how these American legal doctrines or the RICO statute should be applied. The district court, which has far more familiarity with our jurisprudence, could (and did) summarily terminate this litigation.[30]

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[30] Despite the fact that he did not oppose the district court's summary judgment order, petitioner tells this Court that collateral estoppel does not apply because "the indictment had no RICO count" and not all of the elements of fraud were specifically submitted to the jury (Br. 46 n.58). Besides being made in the wrong forum, the argument

(Footnote continued on next page.)

Hence, both the private and public interest factors of *Gulf Oil* counsel for affirmance of the district court's *forum non conveniens* determination.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit was correct and should be affirmed.

Respectfully submitted,

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Of Counsel

February 17, 1988

ADDENDUM

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is gravely overstated. Petitioner was found guilty — beyond a reasonable doubt — of defrauding respondent out of $1,000,000. The transactions that formed the basis for petitioner's criminal conviction are the identical transactions giving rise to this civil case, and he is not entitled to retry the facts that have been found against him. *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 644 (D. Alas. 1982) ("under traditional theories of collateral estoppel, Hitachi's pleas of guilty to the mail and wire fraud counts estop it from denying that it engaged in a pattern of racketeering activity"); *see also Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). To the extent that there were additional RICO factors to be proven over and above those established in the criminal case, respondent filed an affidavit which was not controverted by petitioner.

ADDENDUM A

Title 18 U.S.C. §1962: Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18 U.S.C. §1964: Civil remedies

* * * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.

Title 18 U.S.C. §1965: Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs. . . .

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in wi ich such person resides, is found, has an agent, or transacts his affairs.

ADDENDUM B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. CV 85-7378 JSL (JRx)

Roger Biard,
Plaintiff,

vs.

Alan H. Blair, Monique Mat,
Gerald L. Bilton,
Wilfried Van Cauwenberghe, and
Three B Investment Associates,
Defendants.

Amended Judgment on First, Second,
Third, Fourth, Fifth and Sixth
Claims for Relief

(Entered: April 6, 1987)

The Motion for Summary Judgment by plaintiff Roger Biard ("Biard") on each of the claims for relief stated in his First Amended Complaint came on for hearing before this Court on January 12, 1987 at 1:00 p.m. and on January 26, 1987. Biard appeared and was represented by Bryan, Cave, McPheeters & McRoberts, by Albert S. Golbert and Percy Anderson. Defendant Gerald L. Bilton appeared and was represented by James A. Twitty. Defendant Wilfried Van Cauwenberghe did not appear and did not submit a memorandum in opposition to plaintiff's motion for summary judgment.

The Court, having read and considered Biard's Notice of Motion and Motion for Summary Judgment, the pleadings, affidavits, declarations, the memoranda submitted by the parties in support of and in oppositon to the Motion for Summary Judgment, having heard and considered the oral argument of counsel, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Biard's Motion for Summary Judgment be and it hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to damages in the sum of $600,000.00 on the first, second, third, fourth, fifth, and sixth claims for relief of the First Amended Complaint. In accordance with the provisions of the Racketeer Influenced Corrupt Organizations Act, plaintiff shall recover of defendants Gerald L. Bilton and Wilfried Van Cauwenberghe the sum of $1.8 million in addition to interest thereon at the rate of seven per cent as provided by law, and attorney's fees in the sum of $75,000.00.

Plaintiff shall recover of defendants Gerald L. Bilton and Wilfried Van Cauwenberghe daily interest for each day that the judgment remains unsigned after February 3, 1987, at the rate of 5.35% per annum pursuant to Local Rule 14.10.6 and 28 U.S.C. §1961(a), and his taxable costs, to be submitted by plaintiff at a later date and as approved by the Court.

Further, plaintiff shall recover of defendants Gerald L. Bilton and Wilfried Van Cauwenberghe interest on the judgment at an annual rate of 5.35% for each day that the judgment remains unpaid after the date of judgment.

IT IS SO ORDERED.

DATED: March 30, 1987

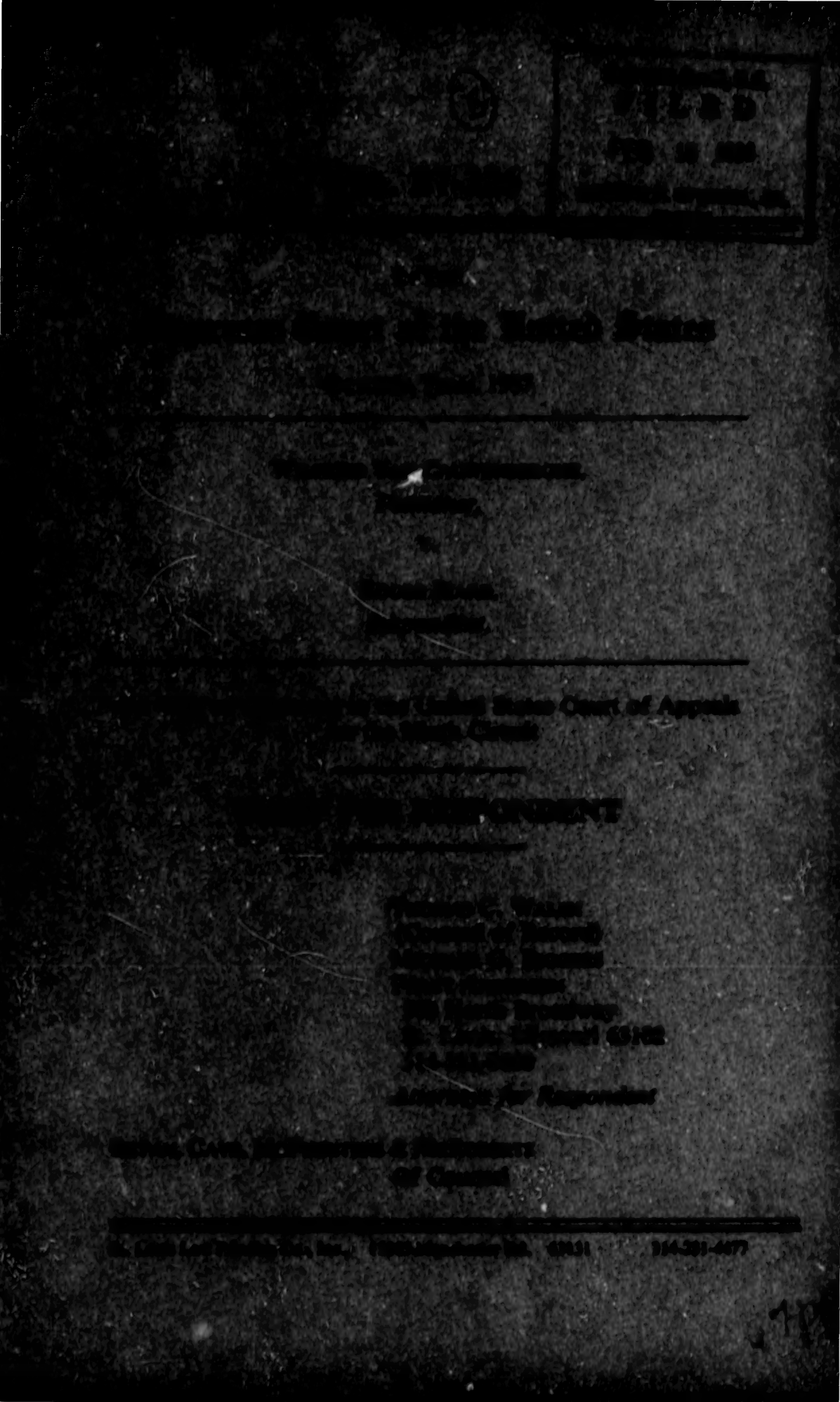
/s/ J. Spencer Letts
United States District Judge

Presented by:

Percy Anderson
Bryan, Cave, McPheeters & McRoberts
Attorneys for Plaintiff
Roger Biard

RESPONDENT'S

BRIEF



QUESTIONS PRESENTED

1. Whether the order of the district court denying petitioner's motion to dismiss based on a claim that he is exempt from service of process because he was extradited to the United States is immediately appealable under 28 U.S.C. §1291.

2. Whether the order of the district court denying petitioner's motion to dismiss based on the doctrine of *forum non conveniens* is immediately appealable under 28 U.S.C. §1291.

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No. 87-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

STATUTES INVOLVED

Title 18 U.S.C. §§1962, 1964(c) and 1965(a) and (d), pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), are reproduced in Addendum A to this brief.

STATEMENT OF THE CASE

Introduction

This civil RICO case was filed as a result of actions of petitioner Wilfried Van Cauwenberghe which have been determined by a federal jury to constitute criminal fraud. The procedural issues presented to this Court do not directly involve the

substance of petitioner's offenses, but a review of the background of this dispute is necessary to place the questions presented in their proper context.

A. The Criminal Proceedings.

In October 1984 petitioner, together with Alan Blair and Gerald Bilton, was indicted by a federal grand jury in the Central District of California in a seven-count indictment. The defendants were charged with three counts of wire fraud (18 U.S.C. §1343), three counts of interstate transportation of a victim of fraud (18 U.S.C. §2314), and conspiracy (J.A. 52-62). Petitioner is a citizen of Belgium; his co-defendants, Blair and Bilton, were, at the time of the transactions referred to in the indictment, residents of the Central District of California (J.A. 8-9).

The indictment charged, *inter alia,* that the defendants had fraudulently induced respondent Roger Biard to lend them $1,000,000 by falsely representing that the defendants had an ownership interest in an apartment complex in Kansas City, Missouri, known as Concorde Bridge. Count One specifically alleged that the defendants "did cause Roger Biard to be transported in interstate commerce from Atlanta, Georgia, to Los Angeles, California, in execution of the aforesaid scheme and artifice to defraud Roger Biard of $1 million" (J.A. 56). Count Two charged the defendants with wire fraud in sending a telex between Geneva, Switzerland, and Los Angeles, California, in connection with the fraudulent scheme (J.A. 56).

In January 1985 petitioner was arrested in Geneva by Swiss authorities pursuant to a provisional arrest request filed by the United States Department of Justice. Subsequently a formal request for extradition was filed by the United States. Swiss authorities, also at the request of the United States government, seized petitioner's assets held in Swiss banks, which consisted of two stock certificates valued in excess of $700,000 (J.A. 71).

Petitioner challenged his extradition before the Swiss courts. On September 25, 1985, the Swiss Federal Tribunal held that petitioner was extraditable for all the offenses charged except conspiracy. He was extradited to the United States on September 26, 1985.

Trial on the criminal charges was held in November and December 1985, and was limited to Counts One and Two of the indictment.[1] The evidence showed that in 1979 petitioner told respondent that he had an excellent real estate opportunity in the United States and invited respondent to Los Angeles to discuss that venture on his next trip to the United States (J.A. 30, 85). Pursuant to this inducement, respondent flew to Los Angeles following a business trip to Atlanta. He was met there by petitioner and his brother (J.A. 30). Petitioner described himself as a member of a partnership that included Blair and stated that the partnership owned a townhouse complex near Kansas City, which he identified as Concorde Bridge, and that the partnership was renovating the complex for subsequent sale as condominium units (J.A. 31). Petitioner asked respondent to lend the partnership $1,500,000 to finance the conversion (J.A. 31, 86-87).

After reviewing a prospectus regarding Concorde Bridge in his Los Angeles hotel room, respondent agreed to lend $1,000,000, to be evidenced by a promissory note secured by a mortgage on the Concorde Bridge development (J.A. 86-88). Respondent gave petitioner a check for $1,000,000 drawn on an Atlanta bank (J.A. 31, 88). The check was originally deposited in a Swiss bank account to the credit of a Netherlands Antilles corporation, and the proceeds were later retransmitted to Los Angeles by wire transfer (J.A. 32).

None of the defendants or the partnership ever owned Concorde Bridge. The note eventually went into default, and the

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[1] The remaining counts were severed.

mortgage was worthless (J.A. 34-35).[2] Petitioner's defense in the criminal case — as in his brief to this Court — was that he is a hale fellow who was merely an innocent dupe in the fraudulent scheme. He did not testify but called five character witnesses, none of whom offered any substantive testimony concerning the fraudulent actions.

The jury found all three defendants guilty on both counts. On January 22, 1986, petitioner was sentenced to a $10,000 fine and one year and one day on Count One. The incarceration provision was satisfied by pretrial detention time. Petitioner was also fined $1,000 and placed on five years' probation on Count Two (J.A. 134-35). He was ordered to pay $458,374 in restitution to the Vanden Stock family (another victim of the Concorde Bridge fraud) and $34,501 to respondent. He was also instructed not to leave the United States until the restitution order was satisfied. Finally, the court ordered that the stock seized in Switzerland should be released to the joint custody of counsel for the parties, to be sold and the proceeds applied in satisfaction of the restitution order.

Petitioner appealed to the Ninth Circuit; Blair and Bilton did not. On April 10, 1987, the conviction was affirmed by the Court of Appeals. *United States v. Van Cauwenberghe,* 814 F.2d 1329, as amended, 827 F.2d 424 (9th Cir. 1987). A Petition for Certiorari was denied by this Court on January 25, 1988. 56 U.S.L.W. 3500.

B. The Civil Case.

On November 12, 1985, respondent filed a civil complaint in the United States District Court for the Central District of

[2] Although petitioner reports that he repaid $800,000 of the loan (Br. 3), he neglects to mention (a) that these payments were funded by sums swindled from the Vanden Stock family, as alleged in Counts 3-6 of the indictment, and (b) that in lieu of these payments, petitioner tried to cajole respondent into reinvesting the $800,000 (and an additional $700,000) in a "new cancer cure" (Trial Tr., No. CR84-963, pp. 2147-48, 298-300).

California against petitioner, Blair, Bilton, Blair's wife, and the partnership known as Three B Investment Associates. Blair, Bilton and Blair's wife were alleged to be residents of Los Angeles (J.A. 9). The complaint asserted a civil RICO claim and also contained counts alleging common law fraud and four other pendent state law claims. Jurisdiction was invoked under the RICO statute, 18 U.S.C. §1964(b) and (c) (J.A. 13).[3]

Respondent did not attempt to serve process on petitioner during the criminal trial or until after sentencing. On February 5, after petitioner had completed his period of detention and while he was on probation, the summons and complaint were served upon him (J.A. 2). On February 6, the trial court issued a writ of attachment against petitioner's stock in the custody of the clerk of the United States District Court (J.A. 75-77).

Petitioner filed a motion to dismiss the complaint, citing Federal Rules 12(b)(1) through 12(b)(5) and claiming that the complaint should be dismissed "for lack of subject matter jurisdiction, lack of personal jurisdiction as to him, improper venue, insufficiency of process, and insufficiency of service of process." Nowhere did petitioner argue that he was immune from any suit, but in arguing that he was entitled to dismissal, he maintained that "it is black letter law that he cannot be served with civil process while present as a result of that extradition" (J.A. 81).

Following extensive briefing (J.A. 79-214) and a conference with the court (J.A. 4, Dkt. Nr. 41), the motion to dismiss was denied in all respects on November 17, 1986 (J.A. 221).

On December 9, respondent filed a motion for summary judgment seeking judgment as a matter of law by application of

[3] During the trial court's preliminary screening process, the court apparently felt that it might not have jurisdiction because diversity of citizenship was lacking, and issued a show-cause order (J.A. 64-65). Upon being told that jurisdiction was predicated on RICO, the court withdrew its jurisdictional inquiry (J.A. 149-50).

the principles of *res judicata* and collateral estoppel arising from petitioner's criminal conviction (J.A. 223). Instead of responding to this motion, petitioner filed a Notice of Appeal on December 15, contesting the denial of his motion to dismiss (J.A. 225). After briefing of the jurisdictional issue in response to a show cause order issued by the Court of Appeals (J.A. 223), the appeal was dismissed on June 7, 1987, for lack of jurisdiction (J.A. 234).

Meanwhile, the trial court, without any resistance from petitioner, sustained respondent's motion for summary judgment and, on April 6, 1987, entered judgment for respondent for $600,000, which was trebled pursuant to RICO to $1,800,000, and also awarded attorneys' fees in the amount of $75,000 (see Addendum B, *post*).

In his Petition for Certiorari, petitioner sought review of the appealability of the *forum non conveniens* motion and of the refusal to dismiss based on his status as an extraditee. This Court granted certiorari on those two jurisdictional questions on November 9, 1987 (J.A. 235).

SUMMARY OF ARGUMENT

The only questions raised by the Petition for Certiorari are whether the Court of Appeals had jurisdiction to review the district court's order denying petitioner's motion to dismiss based on (i) his status as an extradited person and (ii) the doctrine of *forum non conveniens*. Since petitioner did not attempt to avail himself of 28 U.S.C. §1292(b), the Ninth Circuit's power to resolve these issues depends on whether they fall within the "collateral order" exception to the final judgment rule recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and reaffirmed in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Under 28 U.S.C. §1291, the Courts of Appeals have jurisdiction only to review final judgments. This long-standing principle is deemed crucial to the administration of justice and prevents the harassment, cost and delay that would result from the piecemeal appellate disposition of a single cause. *Flanagan v. United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

The collateral order doctrine of *Cohen/Coopers & Lybrand* allows interlocutory appellate consideration of a "small class" of pretrial orders which (1) conclusively determine the disputed question, (2) resolve an important question that is completely separate from the merits, and (3) are effectively unreviewable after final judgment. The Court has narrowly and strictly construed this doctrine. Neither of the issues raised by petitioner satisfies the second or the third component of the collateral order rule.

A.

Petitioner repeatedly proclaims that he has "immunity" because he was extradited from Switzerland, thus transparently seeking to bring himself within rulings of this Court authorizing immediate appeals in certain circumstances involving persons who are truly immune from suit. Petitioner does not and cannot actually claim a genuine "immunity" in that sense; properly characterized, his argument merely is that he is temporarily exempt from service of process because of his status as an extradited person.

The right asserted by petitioner is not "important" in the collateral order sense because, by petitioner's own admission, this case is virtually unprecedented and unlikely to recur. Nor is the purported right completely separate from the merits. Any such right that may exist is designed to serve the interests of the United States courts or the Swiss government, not the extradited defendant. *Stewart v. Ramsay*, 242 U.S. 128 (1916). Whether the interests of either sovereign require an exemption from service of process in the instant case requires an examination of the merits of the case against petitioner and its relationship to the criminal prosecution for which he was extradited.

Furthermore, and most importantly, this defense can be fully vindicated after trial. The true nature of the claimed "immunity" and the interests that it serves demonstrate that petitioner cannot assert a "right not to stand trial," in the sense of *Abney v. United States,* 431 U.S. 651 (1977), or *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). The third collateral order element is satisfied only when prompt appellate review is necessary to prevent destruction of the right asserted. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Our system contemplates that both parties must abide by interlocutory rulings pending the conclusion of the case, and the fact that additional expense and inconvenience may be incurred is not grounds for setting aside the finality requirement imposed by Congress. *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424 (1985).

Petitioner's motion stands in no different shoes than any other jurisdictional or service-of-process motion and, accordingly, must await final judgment before its denial is appealable.

B.

A plea of *forum non conveniens* also requires the trial court to enmesh itself in the merits of the controversy because it must analyze, among other things, access to sources of proof, availability of witnesses, and other problems which might make trial easy or inexpensive. *Gulf Oil Co. v. Gilbert,* 330 U.S. 501 (1947). Six of the seven circuits that have addressed this question have therefore ruled that a *forum non conveniens* determination is not completely separate from the merits and thus fails the second part of the collateral order test. Additionally, a pre-trial *forum non conveniens* analysis depends in large measure on speculation, whereas after final judgment an objective determination can be made of the prejudicial effect, if any, of the allegedly inconvenient venue.

The third *Cohen* element is also missing in a *forum non conveniens* context. An objection to trial in a distant court does not implicate the right to be free from trial altogether and, like any

other privilege based on venue, may be fully restored after final disposition of the case, as in *Gonzalez v. Naviera Neptuno A.A.,* 832 F.2d 876 (5th Cir. 1987). Petitioner's argument that very few *forum non conveniens* motions eventually result in reversals on appeal goes more to the showing of prejudice required to reverse a final judgment than to whether *forum non conveniens* motions should be immediately appealable. *Richardson-Merrell,* 472 U.S. at 436; *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. ____, 107 S.Ct. 1177 (1987).

C.

Even if the issues posed by petitioner's motion to dismiss were immediately reviewable, the merits of those issues are neither before the Court nor of sufficient import for the Court to address them. In any event, the trial court's disposition of petitioner's motion to dismiss was correct. Petitioner has no treaty, statutory or common law freedom from civil process in this case, and the district court did not abuse its discretion in denying the *forum non conveniens* motion.

ARGUMENT

I. THE COURT OF APPEALS DID NOT HAVE JURISDICTION OF PETITIONER'S PURPORTED APPEAL FROM THE DISTRICT COURT'S ORDER DENYING HIS MOTION TO DISMISS.

The Petition for Certiorari in this Court asserted that the Court of Appeals had appellate jurisdiction over two aspects of the order denying petitioner's motion to dismiss. Reason and precedent resoundingly confirm the Court of Appeals' conclusion that the order denying the motion was in all respects an interlocutory, non-final, non-appealable order.[4]

A. Section 1291 Permits Appeals only from "Final Decisions."

The only basis asserted by petitioner in support of appellate jurisdiction is 28 U.S.C. §1291, which provides that:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

Section 1291 embodies the "final judgment rule," which has been characterized by this Court as "the dominant rule in federal appellate practice." *DiBella v. United States,* 369 U.S. 121, 126 (1962). The requirement of finality is of ancient origin and can be traced back in American law to the Judiciary Act of 1789.[5] In fact, its roots are in the English common law, which permitted appeals only from the final disposition of an action. *See Holcombe v. McKusick,* 61 U.S. (20 How.) 552 (1857); *Metcalfe's Case,* 77 Eng. Rep. 1193 (K.B. 1615).

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[4] Petitioner did not file a Petition for Writ of Mandamus in the Court of Appeals but suggested in a footnote to the Ninth Circuit that mandamus might be appropriate if appellate jurisdiction were found wanting. Petitioner has not pursued mandamus in this Court.

[5] Sections 21, 22 and 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

The philosophy underlying the final judgment doctrine was summarized for the Court by Justice Marshall in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368 (1981):

> "This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.' "

Id. at 374 (quoting *Cobbledick v. United States,* 309 U.S. 323, 325 (1940)).

The final judgment rule recognizes that many errors made by trial courts during the process of protracted litigation become merged in, or rendered harmless by, the ultimate disposition of the case and that repetitive, piecemeal appeals during the pendency of the lawsuit would bring the judicial system to a screeching halt. *Cobbledick,* 309 U.S. at 325; *Parr v. United States,* 351 U.S. 513 (1956).

The final judgment rule has been called "crucial to the efficient administration of justice." *Flanagan v. United States,* 465 U.S. 259, 264 (1984). Consequently, the lower courts have been regularly admonished that the rule should be applied with the utmost strictness and that exceptions to the requirement of finality should be narrowly construed. *See, e.g., Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 430-32 (1985); *Flanagan,* 465 U.S. at 265-67.

Taken literally, the term "final decision" means nothing less than the order which ends the litigation on its merits and leaves nothing to be done except to execute the judgment. *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62 (1948); *Catlin v. United States,* 324 U.S. 229 (1945). It is generally true, therefore, that a judgment cannot be deemed "final" within the contemplation of §1291 unless it disposes of all parties and all issues. *See, e.g., Mullins v. Nickel Plate Mining Co.,* 691 F.2d 971 (11th Cir. 1982); *Maneikis v. Jordan,* 678 F.2d 720 (7th Cir. 1982); *Kappelmann v. Delta Air Lines, Inc.,* 539 F.2d 165 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977).

Occasionally during the course of a lawsuit, an order may be entered that would seem to cry out for immediate review, either because of its crucial importance to the balance of the trial court proceedings or because of its perceived error. While the courts have tried, with varying degrees of success, to resist the temptation to bend the final judgment rule to fit a case or class of cases, Congress has sought to ameliorate the occasional harshness of literal application of the rule by enacting §1292(b), which permits discretionary interlocutory appeals upon the certification of the district court and the acquiescence of the appellate court. This Court has adopted Rule 54(b), Fed. R. Civ. P., to facilitate prompt review of judgments which are in fact final as to some parties and/or some issues if the trial court certifies that there is "no just reason for delay" in entering final judgment. *See Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1 (1980); *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737 (1976).[6]

In 1949 the Court also recognized an exception to the finality requirement which permits prompt appellate consideration of a certain "small class" of interlocutory decisions which (a) are separable from and collateral to the issues in the main action,

[6] Petitioner never asked the district court to certify its order under §1292(b) or Rule 54(b), and no such certification was made.

(b) present serious and unsettled legal questions and (c) are too important to be denied review. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978), Justice Stevens, for a unanimous Court, reaffirmed *Cohen* and restated the prerequisites of the so-called "collateral order doctrine":

> "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen,* the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

In the past decade, the Court has wrestled almost every Term with at least one assault on the final judgment citadel under the aegis of the collateral order doctrine. Despite this seige, the Court has refused to sanction broad-based exceptions to the finality requirement, consistently adhering to the "stringent" strictures of *Cohen/Coopers & Lybrand* and repelling pleas for immediate appeal except in truly compelling circumstances. *United States v. MacDonald,* 435 U.S. 850 (1978) (order denying motion to dismiss indictment on speedy trial grounds not appealable); *Coopers & Lybrand,* 437 U.S. 463 (1978) (order refusing to certify class action not appealable); *Firestone,* 449 U.S. 368 (1981) (order refusing to disqualify counsel in civil case not appealable); *United States v. Hollywood Motor Car Co.,* 458 U.S. 263 (1982) (*per curiam*) (order refusing to dismiss indictment for prosecutorial vindictiveness not appealable); *Flanagan v. United States,* 465 U.S. 259 (1984) (order disqualifying counsel in criminal case not appealable); *Richardson-Merrell, Inc., v. Koller,* 472 U.S. 424 (1985) (order disqualifying counsel in civil case not appealable); *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. ____, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987) (denial of permissive intervention not appealable).

At the same time, the Court has hewed to the *Cohen* standard of "practicality" by acknowledging that a certain select, limited

category of orders do indeed fall neatly within the *Cohen/Coopers & Lybrand* guidelines and therefore should be appealable before the conclusion of the entire case. Hence, in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), and *Mitchell v. Forsyth,* 472 U.S. 511 (1985), the Court ruled that the President of the United States and the Attorney General of the United States, respectively, by virtue of their offices, were entitled to immunity from civil suit for their official acts. Permitting a pre-trial appeal on their claim that they could not be tried was necessary to avoid the total loss of that very right through mootness. The "right not to be tried" was thus likened to the constitutionally-based double jeopardy protection acknowledged in *Abney v. United States,* 431 U.S. 651 (1977), as the proper subject of an interlocutory *Cohen* appeal.[7]

In the present case petitioner seeks to avoid the bar of the final judgment rule and to delay the ultimate day of financial reckoning for his criminal behavior by asking the Court to apply the collateral order doctrine (a) to orders refusing to quash service of process on aliens who are on probation in this country following conviction in a criminal prosecution made possible by extradition, and (b) to orders denying motions to dismiss for *forum non conveniens.* For the reasons to be discussed, such orders do not meet the *Cohen/Coopers & Lybrand* criteria, and the Court of Appeals correctly rejected petitioner's efforts to poke additional holes in the time-tested and well-respected finality requirement of §1291.

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[7] In criminal cases the Court has authorized exceptions to the final judgment rule only for orders refusing bail, *Stack v. Boyle,* 342 U.S. 1 (1951); orders denying claims of double jeopardy, *Abney,* 431 U.S. 651 (1977); and orders refusing to dismiss prosecutions based on actions protected by the "Speech or Debate" Clause, *Helstoski v. Meanor,* 442 U.S. 500 (1979).

B. The Denial of Petitioner's Motion To Dismiss Based on His Extradition Status Is Not Appealable.

Petitioner's constant reiteration of his extradition-status claim as one of "absolute immunity" mischaracterizes the real issue presented and effectively assumes the errant conclusion petitioner is asking the Court to draw. Whether the denial of this aspect of petitioner's motion to dismiss is an appealable interlocutory order depends on a careful application of the *Cohen/Coopers & Lybrand* doctrine, as this Court has refined it over the years, to the particular order in question. Talismanic invocation of the phrase "absolute immunity" does not further the analysis but simply begs the question. Properly scrutinized, this aspect of petitioner's motion to dismiss does not involve a claim of immunity and, however denominated, certainly does not satisfy at least two of the criteria for a collateral order appeal.[8]

1. Petitioner does not and cannot claim "immunity" from this suit.

At the outset, it is essential to recognize what petitioner's claim is *not.* Petitioner has never contended that there is any legal impediment to finding him civilly responsible on the allegations of respondent's complaint. Although he has styled his argument as a motion to dismiss for lack of personal jurisdiction, he has not denied (and could not deny) that there

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[8] At times, petitioner erroneously suggests that any "substantial" claim of "immunity" is automatically appealable. For the reasons stated in Points IB(1) and IIA, *post,* petitioner has no such claim; but in any event *Mitchell v. Forsyth* establishes that genuine claims of true "immunity" (the right not to stand trial) are appealable only because they pass the three-pronged *Cohen/Coopers & Lybrand* test. The appellate courts, too, have recognized that all "immunities" are not created equal, and their denial does not *ipso facto* produce an appealable order. *See Segni v. Commercial Office,* 816 F.2d 344, 346 (7th Cir. 1987); *Younghiogheny & Ohio Coal Co. v. Baker,* 815 F.2d 422 (6th Cir. 1987); *Chicago & Northwestern Transportation Co. v. Ulery,* 787 F.2d 1239 (8th Cir. 1986).

are ample grounds for acquiring personal jurisdiction over him in the very court in which this action was commenced.[9] And he has never maintained that there is any statutory or constitutional proscription against serving him with process abroad.[10] In reality, petitioner's position, properly framed, is that he is *not yet* amenable to service of process *in this country* and that the district court accordingly has *not yet* acquired personal jurisdiction over him (J.A. 80-81). The motion at issue, therefore, should be deemed a limited motion to dismiss for lack of personal jurisdiction and to quash the return of service of process.

Although petitioner at one point states in passing that it is "immunity from suit *in a U.S. court* that is at issue" (Br. 16, emphasis in original), there is not a scrap of authority supporting that characterization. Leaving aside for the moment the dispositive differences on the merits between this case and

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[9] At a minimum, petitioner is subject to jurisdiction in California under that state's long-arm statute, which authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CODE CIV. PRO. §410.10 (West 1973). Since petitioner engaged in business in California and committed a fraud there, he clearly satisfies the "minimum contacts" test of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and is constitutionally suable in that state. *See, e.g., Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770 (1984); *Calder v. Jones,* 465 U.S. 783 (1984). These adequate contacts, coupled with the attachment of petitioner's stock certificates in the custody of the district court clerk, also confer *quasi-in-rem* jurisdiction. *Shaffer v. Heitner,* 433 U.S. 186 (1977).

[10] For example, petitioner could be served with process in this action in Belgium, Switzerland or any foreign country in which he could be found pursuant to Federal Rules of Civil Procedure 4(e) and 4(i) and/or the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. *See International Controls v. Vesco,* 593 F.2d 166 (2d Cir.), *cert. denied,* 442 U.S. 941 (1979); *Tamari v. Bache & Co. (Lebanon) S.A.L.,* 431 F. Supp. 1226 (N.D. Ill.), *aff'd,* 565 F.2d 1194 (7th Cir. 1977), *cert. denied,* 435 U.S. 905 (1978).

United States v. Rauscher, 119 U.S. 407 (1886), on which petitioner relies so heavily, the *Rauscher* court emphasized that a defendant's claim that he cannot be prosecuted for a different criminal offense than the one upon which he was extradited is *not* a plea of absolute immunity and does *not* prevent trial in an American court. The Court stated, 119 U.S. at 433:

> "As all the matters set up by the defendant are in the nature of pleas in abatement, going rather to the question of trial on that indictment *at that time* and not denying that at some future time, when the defendant may have been properly brought within the jurisdiction of the court, or rightfully found within such jurisdiction, he may be then tried, it did not involve an issue on the question of guilty or not guilty on which the court, if it proceeded to try the question at all, could direct either an acquittal or a conviction."[11]

In concluding its opinion, the *Rauscher* Court also summarized its decision as holding that the trial court "did not have jurisdiction of the person *at that time.*" *Id.* at 434.

The nature of the right being asserted by petitioner is determined from its substance, not from the label pinned on it by its sponsor.[12]

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[11] Emphasis is ours here and throughout this brief except where otherwise indicated.

[12] Petitioner for some reason delights in quoting (Br. 10, 11, 16) the statement in our Brief in Opposition to certiorari where we acknowledged that *bona fide* claims of *real* absolute immunity — *i.e.,* the right not to be tried — qualify for collateral order treatment. Obviously *Nixon* and *Mitchell* so hold, but we fail to see how petitioner hopes to parlay our recognition of that truism into an admission that his claim in this case should be properly categorized as such an immunity.

2. The order denying the motion to dismiss does not resolve an important issue completely separate from the merits of the action.

Whether or not petitioner's claim is aptly denominated "immunity," the order rejecting it does not meet the *Cohen/Coopers & Lybrand* standards for appealability. As noted above, the second prerequisite of the collateral order doctrine is that the challenged order must "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand,* 437 U.S. at 468. This requirement actually combines several related but distinct concepts. Petitioner's claim that he could not lawfully be served with process while on probation following his conviction does not satisfy at least three of them.

First, although this Court has never addressed "importance" as a separate concept, it has consistently announced that the issue involved must be "important." *See, e.g., Mitchell v. Forsyth,* 472 U.S. at 524. To be "important" in the context of the collateral order doctrine, there must be "a question of general importance beyond the immediate concern of the particular litigants." 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶110.10 at 133 (2d ed. 1987). The lower courts have steadfastly maintained that interlocutory appeals should be reserved for questions that "will settle the matter not simply for the case in hand but for *many* others." *Donlon Industries, Inc. v. Forte,* 402 F.2d 935, 937 (2d Cir. 1968). *See also UAW v. National Caucus of Labor Committees,* 525 F.2d 323, 325 (2d Cir. 1975); *Ronson Corp. v. Liquifin Aktiengesellschaft,* 508 F.2d 399, 402 (2d Cir. 1974). By petitioner's own admission, "[a]ttempts to sue an extradited defendant have been virtually unheard of" and "such cases have been practically nonexistent" (Br. 20, 25 & n.30). Moreover, petitioner's distinctive status as a probationer confined to the United States adds a factual gloss to the issue that is undoubtedly unique. Allowing interlocutory appeal of this issue will certainly not settle a question for "many" other

litigants. In truth, this issue has virtually no significance, much less any general importance, to anyone other than Wilfried Van Cauwenberghe.

Second, the "separate from the merits" concept is designed to avoid interlocutory review of "considerations that are 'enmeshed in the factual and legal issues comprising plaintiff's cause of action.' " *Coopers & Lybrand,* 437 U.S. at 469 (quoting *Mercantile Bank v. Langdeau,* 371 U.S. 555, 558 (1963)). Here, consideration of petitioner's claim to "immunity" is not totally separate from the merits of respondent's case. Examination of the merits is inevitable because general principles of exemption from service of process often recognize an exception when, as here, the case in which service is challenged is related to the proceedings which brought the defendant into the jurisdiction. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1080 (2d ed. 1987). Consideration of the merits is also necessitated by the process of analyzing the interests of foreign governments and the United States government which should determine whether any such exemption is applicable to the particular case.

The attitude of extraditing countries about subsequent civil proceedings in the recipient country may very well turn on the nature of the civil action and/or its interrelation with the criminal case for which extradition was granted. *Cf. Asahi Metal Industry Co. v. Superior Court,* 480 U.S. ____, 107 S.Ct. 1026, 1034 (1987). Likewise, the nature and the substantiality of respondent's case must be considered in any assessment of the United States' interest in having this civil action proceed. *See Pan Eastern Exploration Co. v. Hufo Oils,* 798 F.2d 837, 840 (5th Cir. 1986).

Third, the "separateness" requirement implicates some analysis of whether the issue raised is "sufficiently independent of the *outcome* of the trial to warrant pretrial appellate review." *MacDonald,* 435 U.S. at 859. For the reasons described in detail in the following section, the concerns raised by petitioner

"would be largely satisfied" by a judgment in his favor at trial, *id.*, and accordingly here, as in *MacDonald,* the issue is not "sufficiently independent" to warrant immediate review.

3. This issue can and should be reviewed at the conclusion of the case.

The third requirement of the collateral order doctrine, that the order be "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand,* 437 U.S. at 468, is met only where, unless the order "can be reviewed before [the proceedings terminate], it never can be reviewed at all." *Mitchell,* 472 U.S. at 525 (quoting *Stack v. Boyle,* 342 U.S. at 12). In *Firestone,* 449 U.S. at 376, this Court quoted *United States v. Ryan,* 402 U.S. 530, 533 (1971), as holding that the rejection of a claimed right is "effectively unreviewable" only where "denial of immediate review would render impossible any review whatsoever." This is arguably the *most* fundamental characteristic of the collateral order doctrine. *E.g., Pan Eastern Exploration,* 798 F.2d at 840.

Every litigant with a purported defense, whether addressed to jurisdiction, service of process, or even failure to state a claim, has an understandable interest in prevailing on that defense at the earliest possible time. But such an interest does not make the order "effectively unreviewable" at the end of the case. As noted in *MacDonald,* 435 U.S. at 860 n.7:

> "Admittedly, there is value — to all but the most unusual litigant — in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Accord, Hollywood Motor Car. Co., 458 U.S. at 268-69. *See also Firestone,* 449 U.S. at 376 & 379 n.13.

The order denying the claimed "immunity" can satisfy the "effectively unreviewable" requirement of *Cohen/Coopers & Lybrand* only if it adjudicates an "entitlement not to have to answer for his conduct in a civil damages action" — *i.e.*, the "right not to stand trial." *Mitchell,* 472 U.S. at 525. The Court in *Hollywood Motor Car Co.,* 458 U.S. at 269, emphasized the

> "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not."

Even the rejection of a constitutional claim, which petitioner's is not, must normally await a final judgment before appellate review. *Cobbledick,* 309 U.S. at 325-26; *Hollywood Motor Car Co.,* 458 U.S. at 268-69 n.2.

As expressed by Justice Brennan in his dissent in *Mitchell,* 472 U.S. at 551-53, creative linguistics can twist virtually any defense into "a right not to stand trial." A careful inquiry must be undertaken, therefore, to determine whether it is literally accurate to characterize the right at issue as a right not to stand trial. There are at least five compelling reasons why the claim that petitioner could not lawfully be served with civil process while on probation is not tantamount to a right not to stand trial within the intendment of the collateral order doctrine.

First, as pointed out above, this defense does not purport to preclude any judicial proceedings against petitioner on this same complaint in the same forum. Notwithstanding petitioner's suggestion (Br. 16 n.15), he cannot escape federal process forever. This is doubly apparent in light of the fact that the district court would not have been obligated to dismiss this case even if petitioner's motion had any merit. Rather, the court most likely would have quashed the service but retained the case and ordered service to be accomplished in another fashion. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1354

(1969); *SEC v. Gilbert,* 82 F.R.D. 723 (S.D.N.Y. 1979). No one, we presume, would seriously suggest that such an order would authorize interlocutory review. *See Stevens v. Security Pacific National Bank,* 538 F.2d 1387 (9th Cir. 1976) (no *Cohen* appeal from order quashing service). An order denying the motion to dismiss is plainly just a step toward a genuinely final judgment. Given the limited nature of the defense, it is patently artificial and misleading to label it a right "not to stand trial."

Under general principles granting exemptions from service of process, petitioner's amenability to long-arm jurisdiction in California vitiates his claim to an exemption. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1076 at 506 (2d ed. 1987) ("it makes little sense to grant immunity to a person who can be served in his home jurisdiction under the forum's long-arm statute").

Second, an alleged "immunity" from civil process does not constitute an individual right at all, much less a right not to stand trial. This Court long ago determined that rules exempting certain people from service of civil process are designed to serve the interests of the courts, not to create individual rights or to serve individual interests. *Stewart v. Ramsay,* 242 U.S. 128, 130 (1916) ("the privilege which is asserted here is the privilege of the court, rather than of the defendant"). *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1076 at 500 (2d. ed. 1987). Thus, the commentators emphasize that courts have *discretion* to deny an exemption. *Id.* §1078. Most rules governing service of process do not create individual rights not to be tried. The purposes of process are simply to provide notice of the action and to communicate the assertion of jurisdiction. *See generally id.,* §1061 at 215-16 and §1063 at 225.

This focus on governmental interests is also consistent with principles specifically applicable to extradited defendants. The court in *Shapiro v. Ferrandina,* 478 F.2d 894, 906 (2d Cir.), *cert. dismissed,* 414 U.S. 884 (1973), held that the international law doctrine of "specialty," which was adopted as a matter of

domestic law by *Rauscher* and which restricts the United States from criminally prosecuting for a different offense than that for which the defendant was extradited, is a privilege of the extraditing state. This protection "exists only to the extent that the surrendering country wishes." *United States v. Najohn,* 785 F.2d 1420, 1422 (9th Cir.), *cert. denied,* 107 S.Ct. 652 (1986).[13]

In short, unlike the "immunity" at issue in *Mitchell,* the purpose of the principle invoked by petitioner here is not "to protect the defendant from the burdens of trial." 472 U.S. at 537 (O'Connor, J., and Burger, C.J., concurring). *See also Spiess v. C. Itoh & Co. (America), Inc.,* 725 F.2d 900, 974-75 (5th Cir. 1984) (denial of claim that treaty bars action is not collaterally appealable).

Third, inasmuch as petitioner is neither a foreign government nor a government official or agency, his predicament does not directly implicate our foreign relations. Accordingly, and regardless of whether it was correctly decided, *Segni v. Commercial Office,* 816 F.2d 344 (7th Cir. 1987), is inapposite. *Segni* actually relied on the public entity/private individual dichotomy to distinguish *Pan Eastern,* 798 F.2d 837, a case which is far more pertinent here.

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[13] *Accord, United States v. Vreeken,* 803 F.2d 1085, 1089 n.1 (10th Cir. 1986) ("the rule of specialty is primarily designed to protect the 'dignity and interests' of the asylum state"); *Demjanjuk v. Petrovsky,* 776 F.2d 571, 584 (6th Cir. 1985) ("the right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested"), *cert. denied,* 475 U.S. 1016 (1986); *Berenguer v. Vance,* 473 F. Supp. 1195, 1197 (D.D.C. 1979). *See generally* M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 359-64 (2d ed. 1987). This is also recognized in at least one of petitioner's authorities. *See United States ex rel. Donnelly v. Mulligan,* 74 F.2d 220, 223 (2d Cir. 1934) (extradition treaties are for the benefit of the contracting nations, and rights of asylum and immunity thus belong to the country and not to the accused).

In *Pan Eastern,* the Canadian defendants urged that international comity required the district court to dismiss the action against them. Like petitioner, they sought to wrap themselves in the mantle of *Mitchell.* 798 F.2d at 840. The Fifth Circuit observed that the purpose of the doctrine of comity "is to serve the mutual interests of the *sovereigns.*" *Id.* at 841 (emphasis in original). Yet the Fifth Circuit could identify "no particular purpose of comity that would be frustrated by requiring the appellants to await final judgment before bringing their appeal." *Id.*[14] The court thus determined that the argument for interlocutory appeal was even less persuasive than in the vindictive prosecution and speedy trial cases that this Court has already held are "effectively reviewable" after trial. Petitioner's argument fails for the same reason.

Fourth, the governmental interests served by any purported immunity do not require review before judgment. There is no evidence that Switzerland or any other rendering country is concerned about the civil privileges available to the foreigners it extradites, let alone that any such concerns must be vindicated before trial. The supposed governmental interest in restricting civil process hypothesized by petitioner (Br. 24-25) is implausible or at least greatly exaggerated.

Many extradition treaties, including the treaty involved in this case, do not provide for extradition of nationals of the rendering or asylum state. *See Charlton v. Kelly,* 229 U.S. 447, 467-68 (1913); M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 457 (2d ed. 1987). The rendering state in those instances is therefore not concerned with protecting the private interests of its own citizens. This may well explain why Switzerland did not bother to address the civil process issue in the extradition treaty with the United States. Nor has it lodged any statement at any level in these proceedings or

[14] The doctrine of "specialty" is also a matter of comity. *E.g., Najohn,* 785 F.2d at 1422.

registered any diplomatic protest. Switzerland's utter indifference about this whole issue was perhaps best exemplified by *Najohn,* 785 F.2d 1420, where the Swiss government waived the criminal law principle of specialty set forth in Article IX of the very treaty at issue here (Petn'r Br. Apdx. 6a), thereby allowing the United States to obtain a criminal conviction for offenses other than that for which extradition had been granted.[15]

Fifth and finally, to whatever extent there are individual interests that would be served by petitioner's claim of "immunity," those interests relate to the acquisition of personal jurisdiction, *Vreeken,* 803 F.2d at 1088-89, and do not require vindication before trial in order to be protected. To the contrary, this Court has observed that the individual interest underlying restrictions on personal jurisdiction is a bottom-line protection that the final *result* will not be rendered unfair by virtue of the place in which the suit is conducted. As stated in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72 (1985):

> "The Due Process Clause protects an individual's liberty interest in *not being subject to the binding judgments* of a forum with which he has established no meaningful 'contact, ties or relations.' "

In conclusion, it is noteworthy but hardly surprising that none of the cases relied on by petitioner on the merits of his "immunity" claim involved a collateral order appeal. This issue unquestionably is not "effectively unreviewable" after there is a genuinely "final" judgment.

[15] Although Belgium may in some sense care about its nationals, it cannot have a sovereign concern about whether they can be civilly sued after extradition from *other* countries because Belgium has no way to restrict the terms on which other countries like Switzerland will extradite Belgian nationals.

C. The Denial of Petitioner's Motion To Dismiss Based on *Forum Non Conveniens* Is Not Appealable.

Petitioner was indicted, tried, convicted and sentenced in the United States District Court for the Central District of California for the very acts which form the basis of respondent's civil claim against him. In response to respondent's civil complaint, petitioner's multi-faceted motion to dismiss included a claim that the California forum was inconvenient and that the trial judge should exercise his discretion under the doctrine of *forum non conveniens* to dismiss the complaint.

This doctrine is a facet of venue and is derived from the same source as 28 U.S.C. §1404, which deals with transfers between domestic districts for convenience of witnesses and parties. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 253 (1981); 1 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶0.145[3.-1] at 1583-84 (2d ed. 1986). The elements of *forum non conveniens* were articulated by this Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), and include both public and private considerations. In order for a trial judge to determine whether the proposed trial in the chosen forum is so burdensome and inconvenient as to require dismissal, he should consider, *inter alia,* "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. He is also entitled to take into account the enforceability of any judgment that might be obtained. *Id.*

We will discuss the merits of the *forum non conveniens* motion below in Point II, even though they are not properly before the Court. It is appropriate at this juncture, though, to observe how spurious petitioner's claim of inconvenience really is. While the basis of the motion is that Los Angeles is too far from petitioner's home and that it would unfairly burden him to defend the case there, the evidence in the criminal trial showed that it was *petitioner* who duped respondent into meeting him in

Los Angeles and thereupon defrauded him out of $1,000,000. Indeed, it was this very act that formed the nucleus of petitioner's conviction on Count One. It is thus ironic that petitioner would now characterize Los Angeles as inconvenient since he selected it as the scene of the scam. It is also inimical to the orderly functioning of the legal system to permit petitioner to disrupt and delay respondent's pursuit of civil recompense by asserting a right to an interlocutory appeal of this clearly non-final aspect of the trial court's ruling.

All of the circuits that have addressed the issue presented by this case, except one, have declined to permit immediate appeals from denials of *forum non conveniens* motions. *Carlenstolpe v. Merck & Co.,* 819 F.2d 33 (2d Cir. 1987); *Partrederiet Treasure Saga v. Joy Manufacturing Co.,* 804 F.2d 308 (5th Cir. 1986); *Rosenstein v. Merrell Dow Pharmaceuticals,* 769 F.2d 352 (6th Cir. 1985); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190 (3d Cir. 1983); *Nalls v. Rolls-Royce, Ltd.,* 702 F.2d 255 (D.C. Cir. 1983).[16] An analysis of the necessary components of the collateral order doctrine reveals why these five circuits — and the Ninth Circuit in this case — have concluded that *forum non conveniens* does not qualify for collateral order treatment. The first *Cohen/Coopers & Lybrand* element, requiring a conclusive determination of the issue, may be assumed to be present here in that the trial court cannot be expected to reconsider the venue issue (especially since, in the interim, summary judgment has been granted against petitioner). But the two remaining criteria are not and cannot be met by reason of the very nature of *forum non conveniens* itself.

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[16] *Contra, Hodson v. A.H. Robins Co.,* 715 F.2d 142 (4th Cir. 1983). The Fourth Circuit in *Hodson* did not expatiate on its reasoning but merely stated in a footnote at the end of its opinion, after affirming on the merits, that "all of the requirements of the rule of *Cohen* . . . are present." *Id.* at 145 n.2.

1. A *forum non conveniens* determination is not completely separate from the merits.

The collateral order requirement that the important issue decided by the order must be "completely separate from the merits of the action" is aimed in part at avoiding piecemeal, repetitive appellate consideration of the substance of the case. *Partrederiet,* 804 F.2d at 310. The judge assessing a *forum non conveniens* motion will, of necessity, delve into the merits of the underlying case to ascertain what proof is required and where it will come from. In weighing the *Gulf Oil* factor of "access to sources of proof," the court must immerse itself in the substantive aspects of the controversy and the governing legal principles to determine whether or not the various pieces of evidence cited by the parties are critical, or even relevant, to the establishment of the plaintiff's claim and/or his opponent's defense. *Piper Aircraft,* 454 U.S. at 258-59.

The same considerations pertain to the "availability of witnesses" prong of the *Gulf Oil* inquiry. A defendant resisting venue on *forum non conveniens* grounds will typically identify the witnesses he proposes to call (as petitioner has done here (J.A. 164-65)) and will try to show that they are unavailable. The plaintiff, by contrast, will urge that such witnesses are unnecessary and will generally list his own witnesses, most of whom are presumably local. The trial court must have a fairly thorough understanding of the substantive issues in the case and the legal theories supporting them in order to sort out these conflicting claims regarding convenience and weigh the importance to be assigned to the proposed testimony of the enumerated witnesses.

This Court has said, regarding *forum non conveniens* motions, that "each case turns on its facts." *Williams v. Green Bay & Western Railroad Co.,* 326 U.S. 549, 557 (1946). A *forum non conveniens* analysis is therefore inextricably intertwined with, rather than separate from, the merits of the case.

In *Carlenstolpe,* 819 F.2d at 36, the Second Circuit had the following observations:

> "A forum non conveniens determination cannot be considered 'completely separate' from the merits of the action because such a determination requires an examination of the alleged culpable conduct to assess where the conduct took place and the relationship of the conduct to the plaintiff's chosen forum. Indeed *Gulf Oil Corp.* . . . mandates that a forum non conveniens motion be decided by looking into 'access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.' As such, the determining factors in a forum non conveniens motion are 'enmeshed' in the underlying cause of action, . . . and necessarily involve an inquiry into the merits of the action . . . ."

Accord, Partrederiet, 804 F.2d at 310 ("balancing the factors involved in reaching a *forum non conveniens* decision inevitably requires the court to consider the substantive issues that will arise at trial"); *Rosenstein,* 769 F.2d at 354 ("resolution of *forum non conveniens* issue would require the court to 'enmesh' itself deeply with the innumerable factual and legal disputes presented by this controversy, such as the actual locality of the alleged breach of duty or culpable conduct"); *Coastal Steel,* 709 F.2d at 195 (the *Gulf Oil* criteria are "considerations going to the merits of the case and requiring assessment of the substantive issues in the litigation").

Futhermore, this Court has flatly stated that "the second *Coopers & Lybrand* condition — that the order be truly collateral — is not satisfied if petitioners' asserted right is one requiring prejudice to the defense for its violation." *Flanagan,* 465 U.S. at 268. In *MacDonald,* 435 U.S. 850, the Court unanimously ruled that a speedy-trial claim is not sufficiently independent of the issues at trial to warrant pretrial appellate review. It noted that the question of prejudice to the conduct of

the defense and the events at trial are "intertwined" and that in most cases "it is difficult to make the careful examination of the constituent elements of the speedy-trial claim before trial. Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed." *Id.* at 861.[17]

As in the speedy-trial context, a defendant asserting *forum non conveniens* is asking a court to speculate in advance of trial about the consequences of a denial of his motion. But in *In re Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, 1168 (5th Cir. 1987), the court observed that the trial itself may be the best crucible for judging whether witnesses and evidence were really unavailable and whether the defendant was prejudiced by the conduct of the trial in the particular forum selected by the plaintiff. *Flanagan, MacDonald* and *Firestone* therefore counsel against immediate appeals of *forum non conveniens* issues, not only because such issues are bound up with the merits but also because they can be more accurately evaluated *after* trial than before.[18]

2. Denial of a *forum non conveniens* motion is reviewable after final judgment.

Petitioner's attempt to pass muster under the third requisite of *Cohen/Coopers & Lybrand* — "effective unreviewability"

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[17] Similar observations were made regarding motions to disqualify counsel in *Firestone,* 449 U.S. at 368, *Flanagan,* 465 U.S. at 268-69, and *Richardson-Merrell,* 472 U.S. at 438, although the Court has never determined whether prejudice is an essential ingredient of such a motion.

[18] In both *Richardson-Merrell* and *Flanagan,* the Court stated that if the right claimed *does not* require a showing of prejudice, then it "can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal," thus flunking the third part of the *Cohen/Coopers & Lybrand* test. *Richardson-Merrell,* 472 U.S. at 438; *Flanagan,* 465 U.S. at 268.

— is even more attenuated. He seems to argue that because *forum non conveniens* issues have infrequently resulted in reversal after trial on the merits, they are within the contemplation of the third *Cohen* element. Petitioner has completely misconceived the nature of this requirement.

As already discussed in Point IB, *ante,* this Court in *Firestone,* 449 U.S. at 376, quoted *United States v. Ryan,* 402 U.S. at 533, as holding that the rejection of a claimed right is "effectively unreviewable" only where "denial of immediate review would render impossible any review whatsoever." This requirement has been strictly applied by the Court so that immediate review is allowed only where the right in issue would be lost, probably irreparably, if not reviewed before final judgment. *See Hollywood Motor Car Co.,* 458 U.S. at 266 (right must be such that it "would be destroyed if it were not vindicated before trial"); *Stack v. Boyle,* 342 U.S. at 12 (unless right to bail "can be reviewed before sentence, it never can be reviewed at all").

A *forum non conveniens* motion is nothing more than a particularized species of an objection to venue. A trial in an improper venue may be discomfiting, but an error in ruling on a venue motion simply does not occasion irreparable and unreviewable damage to a defendant that cannot be rectified by a subsequent appeal. This Court itself has strongly suggested that venue motions are not within the purview of the collateral order doctrine and that §1292(b) is the proper vehicle for obtaining interlocutory review of such orders. *Coopers & Lybrand,* 437 U.S. at 470. *See also In re King Memorial Hospital, Inc.,* 767 F.2d 1508, 1510 (11th Cir. 1985) (orders which "essentially only determine the forum in which final decisions will be reached" are not appealable).[19]

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[19] *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), did not hold otherwise. The question in *Langdeau* arose under 28 U.S.C. §1257, and the Court did not even cite *Cohen* but merely relied on its contemporaneous ruling in *Construction Laborers v. Curry,* 371 U.S.

(Footnote continued on next page.)

We have not attempted to verify petitioner's so-called "empirical" study concerning the success rate of post-trial appeals based on *forum non conveniens* (Br. 30-31). His own analysis shows, however, that within the last three months an appellate court has reversed a judgment after trial for erroneous denial of a pretrial motion and has dispatched the case to a foreign court on certain conditions. *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987). That decision by itself disproves the assertion that a *forum non conveniens* objection is irreparably lost by reason of the trial itself.[20]

The principal thesis propounded by petitioner — that the *forum non conveniens* claim may lose its significance after trial on the merits and thus stand less chance of success on appeal — was advanced regarding motions to intervene in *Stringfellow*, 94 L.Ed.2d at 399, and was rejected as a basis for immediate appeal:

> "This contention may be true to some degree, but it is largely beside the point. Although it may be difficult for CNA to show that the harm from the intervention order is sufficiently great to overturn the final judgment, this has little bearing on whether CNA has the right to an interlocutory appeal under the collateral order doctrine. The difficulties of which CNA complains are the same as those faced by any party who is subject to an adverse pretrial order. A party who has had one of several claims dismissed before trial, for example, may similarly believe that the chances of overturning the judgment on this ground are small, even if the dismissal turns out to be erroneous. Yet unless the district court specifically holds otherwise, challenges to this type of order can be raised only after judgment."

542, 551 (1963), where the state supreme court had irrevocably asserted its power to deal with the case, had resolved the merits of the issues, and had left "nothing more of substance to be decided in the trial court."

[20] We are also aware of a number of post-trial reversals based on erroneous pretrial denials of §1404 motions. *E.g., United States v. Georgia*, 466 F.2d 487 (5th Cir. 1972); *Southern Railway Co. v. Madden*, 235 F.2d 198 (4th Cir. 1956); *see also Camp v. Gress*, 250 U.S. 308 (1919); *Macon Grocery Co. v. Atlantic Coast Line Railroad Co.*, 215 U.S. 501 (1910).

Petitioner's argument respecting the difficulty of obtaining relief after the conclusion of the case goes more to the showing required to reverse a final judgment than to whether *forum non conveniens* motions should be immediately appealable. *Richardson-Merrell*, 472 U.S. at 436. Indeed, as previously noted, the Fifth Circuit in *In re Air Crash Disaster*, 821 F.2d at 1168, remarked that the occurrence of the trial had actually sharpened the issues for review, thus enabling the motion to be appraised on the basis of a concrete record rather than pretrial speculation.

The concept of "effective unreviewability" should continue to be limited to those cases in which the occurrence of a trial will actually destroy the right asserted. It should mean literally, as it has since *Stack v. Boyle*, that the right cannot be reviewed after trial, not merely that it is unlikely to produce a reversal at that time.[21]

Petitioner's effort to analogize his status to double jeopardy, in reliance on the dissent of Judge Wilkey in *Nalls*, 702 F.2d 255, is flawed. Double jeopardy, like true immunity from suit, is literally the "right not to be tried." Once the trial occurs, the right is lost forever. A motion challenging venue is not predicated on the right not to be tried, but merely upon the right

[21] Petitioner's "asymmetry" argument (Br. 34) is whimsical. Most motions to dismiss, if granted, produce final appealable orders. Petitioner's insistence on mutuality would create collateral order status for all orders *denying* those motions. Such a prospect is scarcely compatible with the concept of finality, the theory of judicial economy or the collateral order doctrine itself.

to object to a particular court as the scene of the trial. *Carlenstolpe,* 819 F.2d at 36-37. Even though the unsuccessful defendant may be forced to undergo trial in a foreign venue, with its attendant expense, his *forum non conveniens* motion is merely one of many pretrial matters which, if improperly ruled, must await final judgment before correction: "[T]he possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell,* 472 U.S. at 436.

Judge Wilkey in *Nalls* overlooked the fact that *forum non conveniens* does not guarantee that the trial will be convenient, only that it will not be so inconvenient as to be prejudicial to the defendant's ability to present his case. *Williams v. Green Bay & Western Railroad Co.,* 326 U.S. at 554 n.4. If, after trial, it is established that the inconvenience caused such prejudice, that situation can be very effectively remedied by an appellate court, as in *Gonzalez,* 832 F.2d 876. *Coastal Steel,* 709 F.2d at 195; *see also Hollywood Motor Car Co.,* 458 U.S. at 268; *Firestone,* 449 U.S. at 377-78.

Since *Abney,* it has become fashionable to characterize pretrial motions, whether based on jurisdiction, venue, the statute of limitations or some constitutional guarantee, as embodying "the right not to be tried." But the substance of the right being asserted must be examined independent of the label appended to it by its proponents. *Mitchell,* 472 U.S. at 551-53 (Brennan, J., dissenting). Trial in an inconvenient forum no more violates a "right not to stand trial" than does a trial on a complaint that fails to state a valid claim, a trial under a statute that is unconstitutional, or a trial in the face of any of the myriad of other affirmative defenses available to defendants.

It is axiomatic that the denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. *Catlin v. United States,* 324 U.S. 229 (1945); *Texaco, Inc. v. Cottage Hill Operating Co.,* 709 F.2d

452 (7th Cir. 1983). The rule is obviously *a fortiori* with regard to venue motions, including those based on *forum non conveniens.* To avoid inflicting chaos upon the judicial system, those motions, like virtually all other pretrial rulings, must await final judgment.

Petitioner also suggests that the summary nature of the district court's ruling on the *forum non conveniens* motion in the instant case enhances its entitlement to immediate review (Br. 34-36). The correctness of the trial court's order (which is presumably what petitioner wants reviewed) is determined by its conformance to established principles, not by the extent of its articulated rationale. But even assuming otherwise, petitioner's argument boils down to the proposition that the more erroneous an order is, the more it is subject to immediate appeal. That argument is a classic *non sequitur.* The question petitioner has presented here is whether the Court of Appeals had jurisdiction to review the merits of a particular order. Whether the order is right or wrong — or whether it was announced in one page or 20 pages — is irrelevant to that determination. "Appeal rights cannot depend on the facts of a particular case." *MacDonald,* 435 U.S. at 858 n.6 (quoting *Carroll v. United States,* 354 U.S. 394, 405 (1957)); *see Richardson-Merrell,* 472 U.S. at 436.

Petitioner's argument in this regard is afflicted by the same misperception of the effect of jurisdictional limitations as the appellate order under review in *Firestone.* The Court of Appeals in that case had ruled that an order denying a motion to disqualify counsel was not immediately appealable but had nonetheless proceeded to reach the merits because it was overruling prior precedent which had held such orders appealable. This Court affirmed the judgment of nonappealability but reversed the declaration that the ruling could be prospective only:

> "This approach, however, overlooks the fact that the finality requirement embodied in §1291 is jurisdictional in nature. If the appellate court finds that the order from

which a party seeks to appeal does not fall within the statute, its inquiry is over." 449 U.S. at 379.

So too here, an order denying a *forum non conveniens* motion does not meet the requirements of the collateral order doctrine. Although petitioner might choose to cite the summary nature of the order in a petition for mandamus, the order by reason of its very subject matter is not final, and the §1291 "inquiry is over."

Finally, in seeking to minimize the havoc that his proposed emasculation of §1291 would surely wreak, petitioner maintains that the judicial system would actually prosper from the wholesale escalation of interlocutory appeals (Br. 36-39). This misguided policy argument is hinged on at least three faulty premises: (1) that this case had no connection to Los Angeles and that Los Angeles was selected by respondent to inconvenience and harass petitioner; (2) that the district courts will routinely deny meritorious *forum non conveniens* motions; and (3) that the present case imposes an intolerable burden on the district court.

First, as mentioned earlier, petitioner selected Los Angeles as the site for his swindle of respondent, and the critical actions forming the basis for the criminal prosecution occurred there. The jury, by its verdict on Count One in the criminal case, found that petitioner had caused respondent to be transported to Los Angeles in order to execute a scheme to fleece respondent out of $1,000,000. In a very real sense, it could be said that petitioner, rather than respondent, selected the forum that he now chooses to brand as inconvenient in a ploy to escape the consequences of his own misdeeds.

Second, we do not share petitioner's cynicism about the supposed inability or unwillingness of the district courts to deny access to foreign claims that truly belong abroad. The recent action of the United States District Court for the Southern District of New York in the Bhopal, India, disaster clearly undercuts

petitioner's suggestion. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India,* 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified,* 809 F.2d 195 (2d Cir.), *cert. denied,* 56 U.S.L.W. 3247 (1987). Since the crush of inappropriate litigation falls most heavily on the trial courts, we fail to understand why the appellate courts are perceived by petitioner as being more vigilant or protective. In any event, when the district court strays too far from the norm, appeals after final judgments, interlocutory appeals under §1292(b) and extraordinary writs under 28 U.S.C. §1651 are the appropriate vehicles for dealing with such excesses. *See In re McClelland Engineers, Inc.,* 742 F.2d 837 (5th Cir. 1984); *Community Broadcasting of Boston, Inc. v. F.C.C.,* 546 F.2d 1022, 1028 (D.C. Cir. 1976).

Third, the present case is a particularly poor example for petitioner to cite as imposing a burden on the judicial system. Issues framed by the civil complaint have already been resolved against petitioner in the criminal case. Accordingly, because of the applicability of American principles of *res judicata* and collateral estoppel, the trial court was faced with a relatively easy task. Now, since summary judgment has been entered against petitioner, there will be no burden imposed on any American court or jury. The case in the trial court is already over, and this outgrowth of an inappropriate appeal is, paradoxically, the only obstruction to final disposition of the whole case.

* * * *

Besides its other virtues, the final judgment rule spares the appellate courts the task of processing legions of appeals by parties who either win or eventually settle their cases. Adding even a fraction of these appeals to the already overcrowded dockets of our appellate courts would delay justice to the extent of denying it. Petitioner's contention that a broadening of the right of interlocutory appeal would increase judicial efficiency is irresponsible.

Petitioner's proposed expansion of the collateral order doctrine to encompass the issues presented by this case would effec-

tively open the door to the argument that all denials of jurisdictional, venue and service of process motions should be immediately appealable. Such a prospect would create not only bad law but bad policy and would eviscerate the salutary principles embodied in the final judgment rule. "The costs of such expansion are great and the rewards are small." *Flanagan*, 465 U.S. at 269.

The Court of Appeals for the Ninth Circuit had no jurisdiction over petitioner's appeal, and its order dismissing the appeal should be affirmed.

II. THE MERITS OF PETITIONER'S MOTION TO DISMISS ARE NOT BEFORE THE COURT; EVEN ASSUMING OTHERWISE, THE DISTRICT COURT'S DISPOSITION WAS CORRECT.

A significant portion of petitioner's brief is devoted to the merits of his motion to dismiss (Br. 17-25, 39-46). Such a discussion is partly defensible by reason of the overlap between the jurisdictional issues and the merits of the motion — an overlap which, as discussed, dooms petitioner's arguments for appealability. But petitioner ventures far beyond a discussion of jurisdiction and asks this Court to decide the merits of his motion to dismiss even though the Court of Appeals has never done so. Even if the Court should expand the collateral order doctrine to encompass one or both of the issues involved in this case, it should decline petitioner's invitation to address the merits.

In requesting plenary review of the merits, petitioner invokes *Nixon v. Fitzgerald* and *Mitchell v. Forsyth* (Br. 16 n.16). In the process, he overlooks two substantial differences between this case and those. First, *Nixon* and *Mitchell* dealt with extremely important issues of nationwide significance involving the President and the Attorney General of the United States. Second, and more significantly, in both of those cases the issue presented by the merits was raised as one of the Questions Presented in the Petition for Certiorari. *See Nixon*, 48 U.S.L.W. 3844; *Mitchell*, 472 U.S. at 530.

Here, two issues of appellate jurisdiction were specified as Questions Presented in petitioner's application for a writ of certiorari. Under Rule 23(1)(c) of this Court, only questions set forth or fairly comprised in the petition will be considered. This long-standing rule has been consistently adhered to by the Court and will be disregarded "only in the most exceptional cases." *Stone v. Powell*, 428 U.S. 465, 481 n. 15 (1976). Petitioner can scarcely contend that a question addressed to the Court of Appeals' jurisdiction encompasses the validity of an order of the district court.

Furthermore, no briefs on the merits were filed in the Ninth Circuit, and since that court dismissed for lack of jurisdiction, obviously it did not consider the merits. This Court has routinely refrained from considering issues not raised before or considered by the appellate court. *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

There is nothing about the merits of the service of process issue or the *forum non conveniens* question that would have prompted this Court to grant certiorari to review the validity of the district court's order. And there is nothing about Wilfried Van Cauwenberghe, as distinguished from Richard Nixon and John Mitchell, that requires this Court to delineate his privileges and immunities for the edification of the American people. The merits of the fact-specific issues raised in petitioner's motion to dismiss are mundane and unworthy of this Court's attention. Petitioner should not be permitted to smuggle them into this Court camouflaged in jurisdictional garb. Nevertheless, since petitioner has addressed the merits in his brief, we feel compelled, out of an abundance of caution, to respond.[22]

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[22] In *Abney* the Court held that only an issue which is truly collateral can be considered by the appellate court and that a collateral order appeal does not bring the rest of the case to the appellate court under any theory of "pendent" jurisdiction. *Abney*, 431 U.S. at 662-63. Accordingly, if either issue is held to be immediately appealable, *that issue only* should be remanded to the Court of Appeals for consideration on the merits.

litigants who have known each other for years will have to litigate their quarrel at their mutual home. When the plaintiff who selects a U.S. forum is an alien, his or her choice of a U.S. court "is much less reasonable." *Piper Aircraft Co.* v. *Reyno, supra*, 454 U.S. at 256.[46] Residence of the parties "is a fact of 'high significance'" in determining the proper forum. *Koster* v. *(American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 525 (1947), quoting in part *International Milling Co.* v. *Columbia Transp. Co.*, 292 U.S. 511, 520 (1934). "A plaintiff who chooses a foreign forum substantially undercuts the presumption his choice is reasonable." *C.A. La Seguridad* v. *Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983). When both of the parties are aliens, it is a classic instance in which a *forum non conveniens* dismissal is to be expected.

Even before the *forum non conveniens* doctrine had been christened with a Latin name,[47] U.S. courts were resisting exploitation of the U.S. judicial system, and declining to hear suits between aliens, even in cases within U.S. jurisdiction. As one nineteenth-century court put it, "it would be lamentable if courts were compelled to defer the business of the citizens of this country to bestow their time on litigations between parties owing no allegiance to its laws, and contributing in no way to its support." *One Hundred and Ninety-four Shawls*, 18 Fed. Cas. 703, 705 (No. 10,521) (S.D.N.Y. 1848). As Judge Henry J. Friendly put it in this century, "it is *prima facie* undesirable that an overburdened District Court should conduct a trial in a personal injury action between foreigners . . . ." *Conte* v. *Flota Mercante*, 277 F.2d 664, 667 (2d Cir. 1960).

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[46] "[S]uit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners." *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950).

[47] See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947).

This Court in *Canada Malting Co.* v. *Patterson Steamships, Ltd.*, 285 U.S. 413 (1932), declared through Justice Brandeis that the district courts have "unqualified discretion to decline jurisdiction in suits in admiralty between foreigners," as do courts of equity and law. 285 U.S. at 421, 423. See also cases collected in Anno., 32 A.L.R. 6 (1924); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

The specific factors that a district court is required to consider when deciding a *forum non conveniens* motion are not in doubt. They were listed by this Court in *Piper Aircraft Co.* v. *Reyno, supra*, 454 U.S. at 241 n.6, and *Gulf Oil Corp.* v. *Gilbert, supra*, 330 U.S. at 508-09. They overwhelmingly point to dismissal here:

1. *Relative ease of access to sources of proof.* Most of the witnesses are in Europe, and nearly all the documents were generated there. Nearly all of respondent's meetings with Blair or with petitioner, which stretched over a period of three years, took place in Belgium, J.A. 85, 90-97, including "many, many" discussions in Brussels with Blair. J.A. 95; see J.A. 85, 90-97. His three days, out of the three years, that were spent in Los Angeles could have happened anyplace.[48] Witnesses to those conversations are Belgian or French-speaking Swiss, all of whom are beyond the process of American courts. Petitioner submitted an affidavit listing the witnesses he would call. J.A. 163. Of these, 6 fact witnesses and more than a dozen character witnesses were Belgians, 4 were

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[48] *Cf. Transunion Corp.* v. *Pepsico, Inc.*, 640 F. Supp. 1211, 1216 (S.D.N.Y. 1986) (Weinfeld, J.) (dismissing for *forum non conveniens*), *aff'd*, 811 F.2d 127 (2d Cir. 1987): "The only connection this litigation has with New York of any significance is that three PepsiCo employees are alleged to have made fraudulent misrepresentations during the negotiations in New York leading to the signing of the 1983 compromise agreement." *Cf. Clement v. Pehar*, 575 F. Supp. 436, 443 (N.D. Ga. 1983): "The more substantial part of the acts on which plaintiff's RICO count is predicated . . . did not occur in this district. Accordingly, the Court concludes that venue as to plaintiff's RICO claims also is not proper in this district under 28 U.S.C. § 1391(b)."

Swiss, and one was a Belgian resident in England. J.A. 163-66. Blair himself was a British resident. J.A. 113. Most of the Belgians, like petitioner, J.A. 114, do not speak English. J.A. 166. At the criminal trial, a total of thirteen witnesses testified; seven were Belgian, one was Swiss, and four fact witnesses and one expert were American; none of the Americans testified about petitioner, and indeed none had ever met him. J.A. 163-64. The three principal fact witnesses, whose testimony took up the bulk of the four week criminal trial, were all Europeans. J.A. 163. Most of the pertinent documents were generated in Belgium or Switzerland, and most of them, including respondent's prior admittedly inconsistent declarations to the Swiss authorities, are in French. J.A. 109, 166. Some key documents, in the hands of a European attorney, never left Europe at all, and remain unavailable unless they can be obtained by legal action there. J.A. 112, 173, 177, 180-86. The documents that were transported from Europe to Los Angeles for the criminal trial are easily transportable back again.

2. *Availability of compulsory process for unwilling witnesses.* A Belgian court can compel its citizens to give evidence. One Belgian, who gave the F.B.I. testimony exculpating petitioner but was a relative of a complaining witness, stayed in Belgium and never appeared at the U.S. trial. J.A. 178-79. Petitioner attempted through letters rogatory to obtain the testimony of another unwilling Belgian witness, but was unable to execute them before the U.S. trial began. J.A. 164.

3. *Cost of obtaining attendance of witnesses.* Cost of adjudication in Europe is obviously enormously less. Petitioner's funds were all seized prior to the criminal trial and remain unavailable to him.[49] Nevertheless, five character witnesses traveled to Los Angeles at their own expense to testify for him. J.A. 164. Many other Bel-

[49] See J.A. 151; Petition for Certiorari in No. 87-703. The Ninth Circuit held that petitioner's financial condition was such that he was eligible to proceed *in forma pauperis*. J.A. 165-66.

gians wrote letters to the court stating that they would testify on his behalf but were financially unable to come to the United States to do so. J.A. 165-66. In Belgium they would be called and would be easily available.

4. *Possibility of view of premises.* Not applicable.

5. *The local interest in having localized controversies decided at home.* The inappropriateness of Americans attempting to place in context and make normative judgments about the business dealings of two Belgian businessmen,[50] taking place for the most part in Brussels, in French, exactly fits a caution this Court issued through Mr. Justice Holmes:

> "But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez*, 261 U.S. 102, 106 (1923).

Belgian courts are familiar with the norms of Belgian commercial practices.[51] The crux of this case is respondent's claim that, quite apart from what the documents said, petitioner departed from customary real estate sales practices and lied to him. Belgians can judge that best.[52]

6. *The interest in having trial in a forum at home with the applicable law.* The majority of the discussions alleged to be fraudulent occurred in Belgium or Switzer-

[50] Respondent himself characterized the transactions at issue as "a commercial transaction" and "clearly in a business context." J.A. 28. Even Blair, the American, was an expatriate living in Europe and fluently doing business in French. J.A. 85, 113, 204.

[51] *Cf. In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 201 (2d Cir.), *cert. denied*, 108 S. Ct. 199 (1987): "India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it."

[52] All the alleged victims of the scheme were Belgians; "nationality of the victims "is also a factor favoring *forum non conveniens* dismissal. *Ahmed* v. *Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983).

land. Although two U.S. criminal statutes were applied in the very different context of a criminal proceeding, it is not at all clear that U.S. law would apply overall in a civil suit where so many acts complained of occurred in Europe. One important purpose of *forum non conveniens* is to avoid the need for a U.S. court to "untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1947). Generally, U.S. law does not cover the conduct of Europeans in Europe at all.[53]

7. *Unfairness of burdening forum courts and jurors.* Los Angeles has no significant relation at all to a fraud allegedly directed by one Belgian against another. Although respondent also sued the two Americans (one a European resident) who had been defendants in the criminal trial,[54] his only real target in this suit was petitioner, whose substantial personal savings from his thirty years in the real estate business had been brought to this country by the U.S. Government pursuant to the extradition. *See* J.A. 26-27, 33, 68, 71.[55] Blair, who was sentenced to four years in prison, had no funds and defaulted. Bilton, the only defendant resident in the

[53] "[W]e recognize the chance of erroneous interpretation is much greater when we try to construe the law of a country whose legal system is not based on common law principles." *Emami* v. *U.S. District Court*, —— F.2d —— (9th Cir. Dec. 18, 1987). Moreover, "[t]he balance of public and private interest factors may favor trial in a foreign jurisdiction even if it were determined that U.S. law applied." *Kryvicky* v. *Scandinavian Airlines System*, 807 F.2d 514, 517 (6th Cir. 1986), citing *Piper Aircraft Co.* v. *Reyno, supra*, 454 U.S. at 260.

[54] The presence of two American defendants (one a non-resident) does not alter the determination, particularly because neither defended the case. Dismissals for *forum non conveniens* often are appropriate as to some of the defendants in a case. See, *e.g.*, *Genesco, Inc.* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 843 n.1 (2d Cir. 1987); *Johansen* v. *E.I. Du Pont de Nemours & Co.*, 810 F.2d 1377, 1378-79 (5th Cir.), *cert. denied*, 108 S.Ct. 148 (1987).

[55] The legality of that seizure is challenged in *Van Cauwenberghe* v. *United States*, No. 87-703, pet'n for certiorari pending.

United States, did not actively defend and declared bankruptcy. The other two defendants in this suit—Blair's Belgian wife and his partnership—were never served.

8. *Other practical problems that make trial easy, expeditious and inexpensive.* Every practical consideration obviously points to Belgium. For example, translation problems will be minimized in Brussels. See *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 511-12 (S.D. N.Y. 1982). Both petitioner and respondent are native speakers of French, and petitioner's command of English is very limited. J.A. 110, 114. Trial in Brussels does not require translators, with the attendant expense, delay, and possibility of error, as well as loss of subtle distinctions.[56] It is difficult to believe that a U.S. jury could fully appreciate the significance of respondent's testimony, J.A. 105, about whether two individuals addressed each other familiarly as "*tu*" or formally as "*vous*." Belgium, moreover, is a bilingual country, and French is not the only language involved. The criminal trial at times took on an almost comic-opera confusion, as court and attorneys clumsily stumbled through polysyllabic Flemish tax terminology and concepts, French and Flemish interpreters played musical chairs, and one interpreter finally took over from the witness and at the court's direction started testifying on her own. See J.A. 187-208.[57]

[56] *Cf. Opert* v. *Schmid*, 535 F. Supp. 591, 595 (S.D.N.Y. 1982) (dismissing for *forum non conveniens* "[i]n light of the fact that the alleged statements were made in the German language to German-speaking persons . . . ."); *Transunion Corp.* v. *Pepsico, Inc.*, 640 F. Supp. 1211, 1216 (S.D.N.Y. 1986), *aff'd*, 811 F.2d 127 (2d Cir. 1987); *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 510 (S.D.N.Y. 1982).

[57] See also *Schertenlieb* v. *Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978) (referring to the "serious problem of translation"). Translations of documents were objected to. J.A. 205. Misunderstandings and errors were frequent during testimony at the trial. See, *e.g.*, J.A. 88, 89, 110-12. Plaintiff asked for indulgence because "I am a foreigner, Your Honor," J.A. 88, and "I don't speak English all the time," J.A. 98, and after attempting to testify in English unsupported,

In short, this is a case about Belgians, with several Swiss and other European witnesses as well. It was described by respondent himself as a "complex proceeding," J.A. 216, of "magnitude and complexity," J.A. 218, with a "mass of material involved," *ibid.* and, "literally hundreds of pages of potential exhibits," *ibid.* If defended on the merits, it could not properly be decided by summary judgment.[58] It is a case respondent wants heard in Los Angeles, U.S.A., instead of Brussels, Belgium, even though—exactly as in *Gulf Oil Corp.* v. *Gilbert*—"No one connected with that side of the case save counsel for the plaintiff resides there." 330 U.S. at 509.

By every one of the prescribed tests—including not the least the overburdened load of this country's trial courts—this Belgian plaintiff's complaint, if he decides to bring it there,[59] as well as petitioner's defenses, should be judged by their countrymen in their own country.[60]

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called for an interpreter, J.A. 106, which did not end the problems, *e.g.*, J.A. 111, 187-205, 206, 207.

[58] After petitioner entered no general appearance, respondent's summary judgment motion was unopposed. The case could not be decided on collateral estoppel from the criminal conviction for several reasons. First of all, the indictment had no RICO count. J.A. 52. The criminal charges involved a single alleged scheme, not multiple ones. J.A. 53. Moreover, the criminal case resolved nothing about respondent's reliance on any false representations, nor anything about any injury to him, because those were not elements of the offenses there charged, and were issues never put to the jury.

[59] In addition to respondent's admittedly contradictory statements to authorities in Switzerland and the United States, there was extensive evidence at the criminal trial that he had not declared income from abroad on his Belgian tax returns, a fact probably more consequential in his home forum. See J.A. 102-04, 190, 191-92. *Cf. Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 515 (S.D.N.Y. 1982) (foreign plaintiff "is hardly an ideal representative of the public interest"); *cf.* also J.A. 213. The judge in the criminal case concluded that respondent was "not a babe in the woods," J.A. 98, and was "just as guilty as the defendants." R., C.A., No. 87-703 at 1018.

[60] The Belgian courts, it goes without saying and as respondent has recognized, are entirely adequate. See *Ingersoll Milling Machine Co.* v. *Granger*, 817 F.2d 1424 (7th Cir. 1987); *cf. Pacific Employers Ins. Co.* v. *M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir. 1985); *Calavo Growers* v. *Generali Belgium*, 632 F.2d 963, 967 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) (affirming *forum non conveniens* dismissal).

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to dismiss the complaint.[61]

Respectfully submitted,

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[61] Because of this Court's obligation to examine subject-matter jurisdiction of the district court, see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986), we point out that the only basis asserted for federal jurisdiction at all was the RICO statute, 18 U.S.C. § 1964, see J.A. 41, 140, and that there is no reason to believe that Congress intended that statute to create federal jurisdiction of a suit between two aliens involving transactions with no adverse impact on the United States. See *Republic of the Philippines* v. *Marcos*, 818 F.2d 1473, 1491 (9th Cir. 1987) (Hall, J., concurring); *cf. McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957). RICO has been likened to the Clayton Act, *Agency Holding Co.* v. *Malley-Duff & Associates*, 107 S. Ct. 2759 (1987), and the antitrust laws do not extend where the U.S. jurisdictional interest is small. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962). "When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.) (Friendly, J.), *cert. denied*, 423 U.S. 1018 (1975).

APPENDICES

APPENDIX A

STATUTES

Title 28 U.S.C. § 1291 provides:

Final decisions of district courts

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Title 18 U.S.C. § 3186 provides:

Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

Title 18 U.S.C. § 3192 provides:

Protection of accused

Whenever any person is delivered by any foreign government to an agent of the United States, for the

purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

APPENDIX B

Treaty of Extradition Between the United States and Switzerland

[31 Stat. 1928]

Treaty between the United States and Switzerland for the extradition of criminals. Signed at Washington May 14, 1900; ratification with amendments advised by the Senate June 5, 1900; ratified by the President February 25, 1901; ratified by Switzerland January 21, 1901; ratifications exchanged at Washington February 27, 1901; proclaimed February 28, 1901.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Swiss Confederation providing for the extradition of criminals was concluded and signed by their respective Plenipotentiaries at Washington on the 14th day of May, one thousand nine hundred, the original of which Convention, being in the English and French languages is, as amended by the Senate of the United States, word for word as follows:

The Government of the United States of America and the Federal Council of the Swiss Confederation, with a view to the better administration of justice, have resolved to conclude a new Convention for the extradition of fugitive criminals, and, for that purpose, have appointed as their Plenipotentiaries, to wit:

The President of the United States of America: John Hay, Secretary of State of the United States; the Federal Council of the Swiss Confederation: J. B. Pioda, Envoy Extraordinary and Minister Plenipotentiary of Switzerland to the United States; Who, after communi-

cating to each other their full powers, which were found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Government of the United States of America and the Swiss Federal Council bind themselves mutually to surrender such persons as, being charged with or convicted of any of the crimes or offenses enumerated hereinafter in Article II, committed in the territory of one of the contracting States, shall be found in the territory of the other State: Provided that this shall be done by the United States only upon such evidence of criminality as, according to the laws of the place where the fugitive or person shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. In Switzerland, the surrender shall be made in accordance with the laws in force in that country at the time of the demand.

Neither of the two Governments, however, shall be required to surrender its own citizens.

ARTICLE II.

Extradition shall be granted for the following crimes and offenses, provided they are punishable both under the laws of the place of refuge and under those of the State making the requisition, to wit:

1. Murder, including assassination, parricide, infanticide and poisoning; voluntary manslaughter.

2. Arson.

3. Robbery; burglary; housebreaking or shop-breaking.

4. The counterfeiting or forgery of public or private instruments: the fraudulent use of counterfeited or forged instruments.

5. The forgery, counterfeiting or alteration of coin, paper-money, public bonds and coupons thereof, bank notes, obligations, or other certificates or instruments of

credit, the emission or circulation of such instruments of credit, with fraudulent intent; the counterfeiting or forgery of public seals, stamps or marks, or the fraudulent use of such counterfeited or forged articles.

6. Embezzlement by public officials, or by other persons, to the prejudice of their employers; larceny; obtaining money or other property by false pretences; receiving money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained. The amount of money or the value of the property obtained or received by means of such criminal acts, must exceed 1000 francs.

7. Fraud or breach of trust, committed by a fiduciary, attorney, banker, administrator of the estate of a third party, or by the president, a member or an officer of a corporation or association, when the loss involved exceeds 1000 francs.

8. Perjury; subornation of perjury.

9. Abduction; rape; kidnapping of minors; bigamy; abortion.

10. Wilful and unlawful destruction or obstruction of railroads, endangering human life.

11. Piracy; wilful acts causing the loss or destruction of a vessel.

ARTICLE III.

Extradition shall likewise be granted for an attempt to commit, or participation in, any of the crimes and offenses enumerated in Article II, provided such attempt or participation is punishable in the United States as a felony, and in Switzerland with death, or confinement in a penitentiary or workhouse.

ARTICLE IV.

No extradited person shall be tried by a Special Court.

* * * *

ARTICLE VIII.

Extradition shall not be granted when, under the laws of the State upon which the requisition is made, or under those of the State making the requisition, the criminal prosecution or penalty imposed is barred by limitation.

ARTICLE IX.

No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted, unless he expressly consents to it in open Court, which consent shall be entered upon the record, or unless, having been at liberty during one month after his final release to leave the territory of the State making the demand, he has failed to make use of such liberty.

The State to which a person has been surrendered shall not surrender him to a third State, unless the provisions contained in the first paragraph of the present Article have been fulfilled.

* * * *

ARTICLE XIII.

The expenses incurred in the arrest, detention, examination and surrender of the fugitive shall be borne by the State making the demand. The State making the demand shall not, however, be charged for the services of such officials of the Government upon which the demand is made, as receive a fixed salary; for the services of officials receiving only fees, no higher fees shall be charged than those to which such officials are entitled under the laws of the country for services rendered in ordinary criminal cases.

ARTICLE XIV.

The present Treaty shall go into effect thirty days after the exchange of ratifications. This Treaty repeals Articles XIII, XIV, XV, XVI and XVII of the Treaty of

November 25, 1850, between the Swiss Confederation and the United States of America; and the provisions in those Articles shall henceforward apply only to demands for extradition pending at the time when the present Treaty goes into effect.

The ratifications shall be exchanged at Washington as soon as possible. After the denunciation of this Treaty by either of the Contracting Governments, the Treaty shall still remain in force for six months after the day of the denunciation.

In witness whereof, the respective Plenitopentiaries have signed the foregoing Articles, and have affixed their seals.

Done in duplicate at Washington, in the English and French languages, the 14th day of May 1900.

JOHN HAY [SEAL.]

J. B. PIODA [SEAL.]

And whereas the said Convention as amended by the Senate of the United States has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the 27th day of February, one thousand nine hundred and one;

Now therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington, this twenty-eighth day of February in the year of Our Lord one thousand

nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

WILLIAM MCKINLEY

[SEAL.]

By the President:

JOHN HAY
Secretary of State.

[French text omitted.]

REPLY

BRIEF

Supreme Court, U.S.
FILED
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No. 87-336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

ROGER BIARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1987

No. 87-336

WILFRIED VAN CAUWENBERGHE,
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v.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

It is always tempting, because certain general considerations for and against appealability are constant, to treat a particular case with dramatic but familiar boilerplate arguments. Respondent falls into that rhetorical trap in his warnings of "havoc," and in characterizing this case as just one more "assault" on "the final judgment citadel." Resp. Br. 13, 36.

Respondent's metaphor, though striking, is not an apt one. What this Court is undertaking in cases like this one is not some form of "seige" warfare, *id.* at 13, but rather a highly particularized effort to make a practical judgment that carefully weighs the competing claims for and against pretrial appellate review of a specific kind of order (and there are always claims on both sides). The tool this Court uses is not a battle-axe, but a scalpel—analyzing exactly what practical interests are at stake, what the systemic costs and benefits of prompt appeal would be, and what would be lost, both to litigants and the system, if that review were denied.

The conclusion is not preordained. It will differ depending on practical considerations—different for an order denying an immunity claim than for one disqualify-

ing counsel, different for an order denying a double jeopardy claim than for one putting restrictions on permissive intervention. Most pretrial orders, properly, will fail the *Cohen* test. But not all.

The general requirement of finality exists; and so, equally legitimately, as an inseparable part of it, does the *Cohen* line of cases that helps to define in the real world what "final decisions" within the meaning of 28 U.S.C. § 1291 really are.[1] To allow appeal for any particular unique kind of order does not carry appeal for all. See, *e.g.*, *Abney* v. *United States*, 431 U.S. 651 (1977), where this Court allowed appeal from denial of a double-jeopardy motion, but simultaneously refused to allow an appeal challenging the sufficiency of the indictment.

A common thread running through this Court's decisions under the *Cohen* doctrine is this: If the pretrial claim asserted concerns *how a trial shall be conducted*,[2] or depends on the merits of the dispute, or cannot be adequately evaluated until a trial takes place,[3] then it is not appealable under *Cohen*. But if the claim goes to *whether* trial shall take place, and also is based on an *independent status-related right not to have to defend*—not simply a garden-variety personal-jurisdiction or

[1] Respondent repeatedly refers to a "final judgment rule," *id.* at 6, 10, forgetting that "it is a final *decision* that Congress has made reviewable." *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson and Frankfurter, JJ., concurring) (emphasis in original).

[2] *E.g.*, *Stringfellow* v. *Concerned Neighbors*, 107 S. Ct. 1177 (1987) (limitations on intervention); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424 (1985) (disqualification of counsel); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (same); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (same); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (decertification of class); *but see Roberts* v. *U.S. District Court*, 339 U.S. 844 (1950) (denial to proceed *in forma pauperis* is appealable).

[3] *E.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (vindictive prosecution); *United States* v. *MacDonald*, 435 U.S. 850 (1978) (prejudice from speedy-trial violation).

process objection—then it is.[4] More broadly, if trial would effectively extinguish a substantial non-merits-dependent right, appeal is proper.[5] Otherwise stated, review is proper when the claim is truly conclusively ruled upon, truly collateral to the merits, and "review must occur before trial to be fully effective." *Flanagan* v. *United States*, 465 U.S. 259, 266 (1984); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 563 (1978).

I. IMMUNITY OF AN EXTRADITED PERSON.

On extradition-based immunity, respondent attacks both the label used to denominate the right at issue, and the characterization of the interest fostered by that right. Finally, he attacks the right itself. Although the choice of label is trivial, an appreciation of the interest now under attack is vital.

Petitioner certainly agrees that appealability should not turn simply on a "talismanic invocation," Resp. Br. 15, of the term "immunity." See *Segni* v. *Commercial Office*, 816 F.2d 344, 346 (7th Cir. 1987).[6] But neither

[4] *E.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985) (official immunity); *McDonald* v. *Smith*, 472 U.S. 479 (1985) (immunity under Petition Clause); *Richardson* v. *United States*, 468 U.S. 317 (1984) (double jeopardy); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (official immunity); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (same); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech and Debate Clause immunity); *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy). See also *Segni* v. *Commercial Office*, 816 F.2d 344 (7th Cir. 1987) (foreign sovereign immunity); *Briggs* v. *Goodwin*, 569 F.2d 10, 58-60 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (witness immunity).

[5] *E.g.*, *Stack* v. *Boyle*, 342 U.S. 1 (1951) (excessive bail); *Swift & Co. Packers* v. *Compania Colombiana de Caribe, S.A.*, 339 U.S. 684 (1950) (attachment); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (statutory right to security for costs).

[6] The term "immunity" is the one commonly and appropriately used, and was not concocted by petitioner. See, *e.g.*, *Ford* v. *United States*, 273 U.S. 593, 614-15 (1927); *Collins* v. *O'Neil*, 214 U.S. 113, 120 (1909); 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 261 (1891); *cf. Page Co.* v. *Macdonald*, 261 U.S. 446 (1923). Nor does appealability turn on whether the protection is cast in terms

should it turn on any other term, such as "exempt," which respondent prefers. Resp. Br. 7, 13. Appealability has to be resolved by looking at the substance of the right asserted, and measuring it in light of the *Mitchell* v. *Forsyth*, *Cohen* and *Coopers & Lybrand* criteria.

A. The Immunity Is a Substantial Protection.

The immunity petitioner claimed is the right not to have his forced presence in the United States, obtained by international extradition, taken advantage of to require him to defend a civil suit in this country. Respondent says that he is reluctant to discuss the existence *vel non* of that immunity; but he inevitably thrusts forward the issue himself, because it is only by denying the immunity that he can hold his argument against appealability together.[7] The appealability question inevitably turns on the nature of the protection claimed and whether that immunity claim was real, important and substantial. It was.

1. This Is Not a Technical Quarrel Over Process.

Respondent mischaracterizes the interest at stake here as simply the enforcement of a defendant's dissatisfaction with a manner of service of process. But petitioner is not challenging the denial of an ordinary litigant's objection to a particular form of service. Rather, he claims a status that carries with it an affirmative protection. He contests the violation of a statutorily- and treaty-based right flowing from his status as an ex-

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of jurisdiction or of quashing service; *cf., e.g., Asahi Metal Ind. Co.* v. *Superior Court*, 107 S.Ct. 1026, 1030 (1987); the substance of the protection asserted is what counts.

[7] Given the requirement that to be appealable an immunity claim must be "substantial," *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), or "colorable," *Richardson* v. *United States*, 468 U.S. 317 (1984), the purely legal issue of its nature is necessarily embraced in the grant of certiorari, *cf.* 472 U.S. at 530. In any event, this as well as *forum non conveniens* are certainly open for this Court's resolution insofar as the Court deems necessary and appropriate. See, *e.g., Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981).

traditee—*a right not to be required to defend U.S. litigation that is commenced by taking advantage of an extraditee's forced presence in this country.* Petitioner is, without resort to any "creative linguistics," Resp. Br. 21, "contesting the very authority . . . to hale him into court." *Abney, supra*, 431 U.S. at 659.

Like other immunities from defending in court—governmental, presidential, diplomatic—the immunity invoked here attaches to his status, it is entirely legal in nature, and it exists for independent policy reasons. It does not depend on any facts at issue in the lawsuit and is not simply a defense to liability. It acknowledges "the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982). That a person may at some time cease to be in this (or any other) protected status, *cf.* Resp. Br. 16, does not in any way diminish the force of the protection when it, and the reasons for its existence, have as here been squarely violated.[8] See pp. 11-14, *infra.*

2. Petitioner Had a Statutory Right of Return.

Respondent's brief manages almost totally to ignore the statutes which were held in *United States* v. *Rauscher*, 119 U.S. 407 (1886), to guarantee an extradited person a right to return whence he came unmolested except for the criminal case for which he was extradited. 18 U.S.C. §§ 3186, 3192. Respondent says simply that those statutes do not in terms deal with civil suits. Resp. Br. 44. That is textually true; in fact, they

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[8] Petitioner was required to remain in this country by specific sentence in the criminal proceeding. J.A. 135. Respondent, who acknowledged there was immunity during trial, J.A. 130, now argues that it should cease while the sentence is being served. Resp. Br. 45. But the rule of course, as statute, treaty and logic require, has always been that the immunity persists until the extradited person has been allowed to go home. *Cosgrove* v. *Winney*, 174 U.S. 64 (1899); see also *Adamy* v. *Parkhurst*, 61 F.2d 517 (6th Cir. 1932) (immunity from civil process applies while released on bail).

do not in terms deal with other criminal prosecutions, either, yet *Rauscher* unhesitatingly so applied them, and on the identical logic other courts have always held that they bar civil proceedings as well. *E.g., In re Reinitz*, 39 Fed. 204 (C.C.S.D.N.Y. 1889).[9] The interpretation is of long standing, and the statutes have never been changed by Congress. In fact, a bill was introduced after *Rauscher* to alter them, but failed to pass. See S. 3115, 50th Cong., 1st Sess. (1888); 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 250-51 (1891).

3. *Petitioner Had a Treaty Right "To Depart in Peace."*

In trying to find some way to distinguish the cases that repeatedly recognized civil immunity, respondent notably fails to cite one single case that has ever even questioned it.

It is true that prior to being settled in *Rauscher*, the question whether extradited persons enjoyed immunity from other civil and criminal proceedings had been a topic of vigorous debate.[10] But after *Rauscher*, it ended.

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[9] No one except respondent has ever seen a distinction between civil suits involving civil summons or civil arrest, and the immunity cases apply to each. See, *e.g.*, authorities at Pet. Br. 20 n.19; *Adamy* v. *Parkhurst*, *supra*; 1 J. MOORE, n.10, *infra*.

[10] That pre-*Rauscher* debate was recounted at length in 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 259-280 (1891). Under the rubric "Civil Suits," *id.* at 259, he states, as respondent quotes, Resp. Br. 45, that

> "where there has been no abuse of process, and neither force nor fraud, the courts have often held that civil actions could be maintained against a person wo has been extradited. The question has never been before the Supreme Court of the United States for adjudication, and cannot be regarded as finally determined." *Id.* at 260.

The very next sentence, however—which respondent does not quote—is:

> "By parity of reasoning, however, it does not appear difficult to reach a logical conclusion." *Ibid.*

[Continued]

As this Court later reiterated, an extradited person brought to this country "retained the right to have the offence for which he was extradited disposed of and then to depart in peace." *Cosgrove* v. *Winney*, 174 U.S. 64, 69 (1899). He was "entitled to the same measure of protection as if he had not left the jurisdiction. This is what is meant by his 'right of return.'" 1 J. MOORE, *op. cit. supra*, at 272.[11]

Respondent relies on some authorities that attack as outmoded the *general* immunity doctrine that usually

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[10] [Continued]

Moore then proceeds to state the "logical conclusion" that

> "If the accused be within the jurisdiction for the sole purpose of being tried for the offence for which he was surrendered, it follows that he is *not amenable to process in civil actions*. Except as to trial for the extradition offence, he stands in respect to all prior transactions as if within the jurisdiction of the asylum state. Consequently . . . he is not subject to civil suits any more than to criminal prosecutions." *Id.* at 261 (emphasis supplied).

There follows a discussion of the pre-*Rauscher* cases, and his summary—accurately and contextually faithfully quoted in petitioner's opening brief at 23—that

> "The fugitive having been delivered up for the sole purpose of being tried for the offence with which he was charged, and the disability of the courts being jurisdictional, *it follows that the prisoner is not liable to their process for civil any more than for general criminal purposes*. The fugitive is not delivered up with a view to answer in civil suits in any respect." *Id.* at 272 (emphasis supplied).

In fact, Moore adds that "The reasons for holding otherwise are *less strong in civil* than in criminal actions." *Ibid.* (emphasis supplied); *cf. In re Johnson*, 167 U.S. 120, 126 (1897).

[11] S. SPEAR, LAW OF EXTRADITION 557 (2d ed. 1884), which respondent says "does not consider" international extradition or civil immunity, Resp. Br. 45 n.26, in the passage cited by petitioner refers to the right "'to depart in peace . . . as against all attempts at legal interference therewith," and explains that "The preponderance of authority sustains it when the extradition is international; . . ." The immunity does not apply to interstate extradition, where there is no statute or treaty so requiring. *Lascelles* v. *Georgia*, 148 U.S. 537 (1907).

applies to ordinary parties and witnesses. But those critics are talking about something else. The *general* immunity is judge-made to serve the courts and the judicial process. But the immunity *of extradited persons* is different. It is a statutorily- and treaty-based [12] affirmative right inhering in particular individuals by virtue of a unique status, and depends on longstanding interpretations of federal statutes and treaties that have never been altered.

4. *Petitioner Had Standing.*

Respondent finally argues that petitioner has no standing to assert his treaty right. Resp. Br. 22-23. In so doing, respondent really is seeking to overrule *Rauscher* and a century of cases following it.

First, respondent's argument takes no account of the safe-return statute, 18 U.S.C. § 3192. There has never been a hint anyplace that that statute cannot be invoked, as it was in *Rauscher*, by an extradited person injured by its violation.

Secondly, in suggesting that the treaty afforded no enforceable rights to petitioner, respondent is proposing a wholesale revision in extradition law, which has always recognized that unlike some other kinds of treaties, extradition treaties *do* confer legally enforceable rights on individuals.[13] The *Rauscher* Court itself reiterated in a

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[12] Although two treaties cited by respondent make the rule of civil immunity explicit, there has never been a suggestion anywhere that the protection in other treaties is any less. See, *e.g.*, *Johnson* v. *Browne*, 205 U.S. 309, 321-22 (1907). When a treaty has no express limitation, "it is the practice of this Department to imply such a limitation." 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 235 (1942) (quoting Security of State Root). The treaty in *Rauscher* itself had no provision on the subject at all, civil or criminal, but this Court had no hesitation in implying it.

[13] *Johnson* v. *Browne*, 205 U.S. 309, 317-18 (1907). There are many other examples of treaties "which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. 580, 598 (1984); see also, *e.g.*, *Cook* v. *United States*, 288 U.S. 102 (1933). Although some treaties forbid extradition of nationals, many do not. *E.g.*, Treaty of Extradition with United Kingdom, 28 U.S.T. 227 (1972).

companion case that an extradited person "came to this country clothed with the protection which the nature of such [extradition] proceedings and the true construction of the treaty gave him." *Ker* v. *Illinois*, 119 U.S. 436, 443 (1886). The courts of appeals have consistently rejected respondent's proposal.[14] So has the State Department, announcing that any notion that extradition treaties "create rights only between the Governments concerned . . . . certainly is not the law of the United States." 4 J. MOORE, DIGEST OF INTERNATIONAL LAW 321-22 (1906) (quoting Secretary of State). In spite of respondent's opinion that petitioner is one of "a rather undeserving class of persons," whose rights are "unworthy of this Court's attention," Resp. Br. 39, 41, this treaty even makes specific provision that its protection applies "unless he [the extradited person] expressly consents . . . in open court." Treaty of Extradition, Art. IX, 31 Stat. at 1932, Pet. Br 6a.[15]

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[14] *E.g.*, *United States* v. *Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("The government's argument that Thirion lacked standing to complain of a violation of the treaty is without merit"); *Jaffe* v. *Smith*, 825 F.2d 304, 307 (11th Cir. 1987) ("[u]nless a defendant can . . . establish a treaty violation, she or he may not object to trial in the United States"); *United States* v. *Vreeken*, 603 F. Supp. 715, 717 (D. Utah 1984), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 955 (1987) ("the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty"); *United States* v. *Sobell*, 142 F. Supp. 515, 524 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957) (extradited person may assert treaty rights "unless he waives the issue").

[15] See *United States* v. *Watts*, 14 Fed. 130, 139-40 (D. Cal. 1882) ("the immunity so guarantied is a right of the prisoner . . . . [otherwise] the poor and obscure offender might have no means of drawing the attention of that government to his case."

The cases relied on by respondent did not involve post-extradition proceedings at all.[16] One case last year did endorse what respondent proposes; it has already been criticized and listed as an anomaly in the most contemporary extradition treatise.[17]

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[16] Most of the cases that respondent cites arose in the very different situation of an individual who was being extradited *from* the United States trying to set limits on the scope of the extradition. *Berenguer* v. *Vance*, 473 F. Supp. 1195 (D.D.C. 1979); *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The same district court that decided *Berenguer* unhesitatingly holds that extradited individuals who are tried in this country may invoke treaty rights. *United States* v. *Sensi*, 664 F. Supp. 566, 570 (D.D.C. 1987). *Shapiro* v. *Ferrandina*, 478 F.2d 894 (2d Cir.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973), which respondent misdescribes, Resp. Br. 22-23), was likewise, as Judge Friendly described, "the converse situation" to the one at bar. 478 F.2d at 906. Even so, he explained that the *Rauscher* rule of speciality has two aspects: it is both a doctrine of international law (enforceable by countries) and "a rule of domestic law," and in the latter aspect is enforceable in proceedings like the present one by individuals tried in U.S. courts. 478 F.2d at 905. His earlier opinion in *Fiocconi* v. *Attorney General*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), therefore carefully construed the intended scope of a foreign country's extradition order.

United States v. *Najohn*, 785 F.2d 1420 (9th Cir.), *cert. denied*, 107 S. Ct. 652 (1986), is not at all to the contrary; it held that the country which granted extradition may consent to expanding its grant to other offenses made extraditable by the treaty—not, as respondent seeks to establish in the present case, that unless the extraditing country objects, the treaty can be ignored. *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934), not only recognized the extradited individual's standing, but also that he or she can enforce civil immunity. Finally, it is difficult to see what support respondent finds, Resp. Br. 41-42, in *United States* v. *Molina-Chacon*, 627 F. Supp. 1253 (E.D.N.Y. 1986), *aff'd sub nom. United States* v. *DiTommaso*, 817 F.2d 201 (2d Cir. 1987), which held: "In the present case the doctrine of speciality simply does not apply. Molina-Chacon was *not* extradited . . . ." 627 F. Supp. at 1264 (emphasis in original).

[17] The no-standing view respondent urges was approved by the Ninth Circuit in the criminal prosecution of petitioner. *United States* v. *Van Cauwenberghe*, 814 F.2d 1329, 1335 (9th Cir. 1987), *cert. denied*, 56 U.S.L. Week 3500 (1988). That decision is described by the most recent treatise on extradition as "inconsistent with prior cases on the subject and contrary to the legal literature on this point." M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 368 n.147 (2d rev. ed. 1987).

B. Denial of the Immunity Is Appealable.

1. *The Protection Is Important.*

Respondent argues that an order is "important" enough for appeal if it resolves "a question of general importance beyond the immediate concern of the particular litigants," or if the ruling settles "the matter not simply for the case at hand but for many others." Resp. Br. 18. That is certainly so here. Respondent is asking this Court to overrule a century of cases, revise statute and treaty interpretations, change the law, and open the door to U.S. lawsuits that for a century have not been seen.

The immunity guarantees that a country can extradite someone to the United States confident that his or her presence will not be taken advantage of for any other judicial proceedings—criminal charges, tax claims, civil penalties, or civil litigation. Respondent expresses doubt that any extraditing country "is concerned about the civil privileges available to the foreigners it extradites." Resp. Br. 24. Yet our own Department of State has cared enough to require that any foreign government seeking to extradite someone from the United States must guarantee explicitly that that person, if extradited, will not be subjected to private civil suits. 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 239 (1942).

Respondent argues that the protection is trivial and should be disregarded because petitioner could have been sued in a Belgian court, see J.A. 108, 171, or might have been required to defend in a U.S. court if he had been effectively served by some means "in Belgium, Switzerland or any foreign country in which he could be found." Resp. Br. 16 n.10. But amenability to suit at home does not lessen the value of protection from suit in a foreign tribunal half way around the globe. And speculations about other means by which petitioner somehow might

have been compelled to defend, or might be required to do so in other circumstances at some future time, this Court has held, are "immaterial." *United States* v. *Rauscher*, *supra*, 119 U.S. at 433. What matters is that the protection granted by statute and treaty, and the interests it serves, were attacked and plainly violated here. The violation of that protection cannot be casually disregarded on an unsupported assumption that some effective method to obtain jurisdiction over petitioner that did not violate the international legal system might have been found. *Cf. Peralta* v. *Heights Medical Center, Inc.*, 56 U.S.L. Week 4189 (U.S. 1988).[18] In reality, respondent tried to take advantage of petitioner's forced presence exactly because of the lack of practical alternatives. "There are difficulties associated with service in a foreign country . . . that do not exist when extraterritorial service is made within the United States." 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1133 at 367 (1987) (footnote omitted).[19] The fact that

[18] That is particularly so because the RICO statute of limitations long ago expired.

[19] Service by domestic mail on petitioner while he was sentenced to remain in the United States would, like personal service, take advantage of his forced presence in this country in an extradited status. Rule 4(i), Fed. R. Civ. P., "does not solve all the problems that may arise in connection with service abroad." 4A C. WRIGHT & A. MILLER, *op. cit. supra*, at 369. Service abroad is subject to a complex international treaty, the Hague Convention on Service Abroad, to which the United States, Belgium and Switzerland all are signatories. 20 U.S.T. 361. Service abroad, even if it could affect a defendant who was not present there, is permitted and valid in many countries only if it is established that adequate basis for personal jurisdiction existed. Contrary to respondent's assertion, Resp. Br. 16 n.9, petitioner never was "engaged in business in California," and whether personal jurisdiction could be asserted over petitioner, other than by personal service, based on "a contract-negotiation session," is at best problematical. See *Helicopteros Nacionales* v. *Hall*, 466 U.S. 408, 416 (1984); see also *Asahi Metal Ind. Co.* v. *Superior Court*, 107 S. Ct. 1026, 1034 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significance in assessing the reasonableness of stretching the long arm of personal jurisdiction over

respondent never attempted any sort of U.S. service abroad speaks for itself.[20]

By mischaracterizing the issue presented as merely an individual litigant's captious dissatisfaction with a manner of service, respondent erroneously understates the importance and scope of the District Court's rejection of petitioner's immunity. Petitioner's claim is not that someone cannot hand him a paper at the Probation Office in California.[21] It is that because of his status, he cannot be required to come into a U.S. court to respond to that act. That is a real and substantial right, analogous to the immunity of a diplomat, and has indeed been characterized as one of the "*diplomatic guaranties*" of an extradited person. *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934) (emphasis in original). Its violation is inconsistent with international understandings on which the successful operation of the process of extradition rests. *Cf. Local No. 438* v. *Curry*,

national borders"). Although district courts often quash service rather than dismiss, dismissal is appropriate where, as here, effective service is unlikely or no longer possible. *E.g., Bacino* v. *American Federation of Musicians*, 407 F. Supp. 548 (N.D. Ill. 1976).

[20] Respondent's further hypothetical suggestion that *quasi in rem* jurisdiction existed is without record support and legally erroneous. The order that would have attached petitioner's stock certificates in California was by its terms prospective only, J.A. 76, because they had lawfully left California before the order was entered. Moreover, these certificates, acquired many years prior to the alleged fraud, see *United States* v. *Van Cauwenberghe*, *supra*, 827 F.2d at 433 n.6, were "completely unrelated to the plaintiff's cause of action" and therefore could not support jurisdiction. *Shaffer* v. *Heitner*, 433 U.S. 186, 209, 213 (1977). The fact that they along with petitioner were extradited to California, however, and that this encouraged respondent to bring a U.S. suit, see Resp. Br. 49, further emphasizes the effort of this civil litigation to take advantage of the extradition process.

[21] Petitioner in fact did raise service-of-process objections relating to the form of the summons and how it was delivered, which were summarily rejected. J.A. 83. He did not seek to appeal that ruling, nor the rejection of his general personal jurisdiction objection. J.A. 80, 228.

371 U.S. 542, 550 (1963) ("postponing review [under 28 U.S.C. § 1257] would seriously erode the national labor policy"); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-85 (1975) (§ 1257).

Extradition requests should not become vehicles for cloning civil litigation—as occurred during the years before the *Rauscher* decision.[22] If this Court reaffirms the established immunity, a clear and simple issue will have been resettled once and for all. Unlike even double jeopardy (*Abney, supra*) or foreign sovereign immunity (*Segni, supra*), this is a simple point of law that does not admit of endless contextual variations. *Cf. Richardson* v. *United States*, 468 U.S. 317, 326 n.6 (1984). The only question a district court will face in a future case will be simple and objective: whether the person is detained in this country by force of extradition. The immunity, although important, is about as clear-cut and narrow as one could imagine.

2. *The Protection Is Completely Separate From the Merits.*

Respondent's argument that petitioner's immunity claim is not separate from the merits, Resp. Br. 18-20, is impossible to follow. Immunity does not depend on the merits at all. The suit could be about anything. The "attitude" or "interest" of foreign governments, *id.* at 19, is of no relevance at all,[23] and in any event would not be "enmeshed" with the merits of respondent's lawsuit.

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[22] "When Lagrave arrived in New York, he was served with a warrant of arrest issued upon the indictment for burglary in the third degree, and also with orders of arrest in civil actions instituted by creditors." 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 262 (1891).

[23] *Pan Eastern Exploration Co.* v. *Hufo Oils*, 798 F.2d 837 (5th Cir. 1986), relied on at Resp. Br. 19-20, 23-24, involved not extradition but a request for dismissal based on comity, which "is not a binding obligation, but a discretionary decision." 798 F.2d at 839. The court further commented that a protection from trial, rather than liability comity is not, would meet the *Mitchell* v. *Forsyth* criteria. *Id.*, n.13.

3. *The Protection Cannot Be Effectively Vindicated After Trial.*

Like other international immunities, and like double-jeopardy protection, the right asserted here embodies an affirmative policy to spare individuals with this unique status from having their extradition used to force them to answer in foreign civil litigation, and also to guarantee all foreign nations that treaty-based restrictions protecting extraditees will be observed. *Cf. Segni* v. *Commercial Office, supra.* Petitioner was not asserting "a mere defense to liability." *Mitchell* v. *Forsyth, supra*, 472 U.S. at 526; see also *Spiess* v. *C. Itoh & Co.*, 725 F.2d 970, 975 (5th Cir. 1984). The right is designed to "protect a defendant from trial as well as liability." *Williams* v. *Collins*, 728 F.2d 721, 726 (5th Cir. 1984). Respondent's extended argument that post-trial appeal is good enough, Resp. Br. 20-25, boils down to a recapitulation of arguments made elsewhere in his brief that the immunity is unimportant and no different from any due-process challenge to personal jurisdiction, that petitioner lacked standing, and that the immunity should be judicially overturned.

II. *FORUM NON CONVENIENS.*

A. Summary Denial of the Challenge to Trial in the United States Was Appealable.

1. *The District Court's Summary Rejection Is an Issue Completely Separate from the Merits.*

(a) *The Summary Ruling Took No Account of* Forum Non Conveniens *Law.*

The District Court's *forum non conveniens* ruling here was unreasoned and anomalous. Even more clearly than in the ordinary *forum non conveniens* situation, it was totally separate from the merits.

The law entitles a defendant to heave his or her *forum non conveniens* claim heard and adjudicated *prior to trial* with *findings* that apply the legal standards an-

nounced in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). Here, petitioner did not receive any of that. This was, without more, reversible error. See authorities at Pet. Br. 35. Not postponing appeal in such a situation places no undue strain on the appellate system. The issue is reduced to a simple and pure one of law.

Respondent seeks to brush aside the failure to follow the requisite procedure, Resp. Br. 35, arguing that the "summary nature of the district court's ruling" simply goes to its correctness, and should not bear on appealability. But the answer was given by Justice Jackson, concurring with Justice Frankfurter in *Stack* v. *Boyle*, 342 U.S. 1 (1951): to allow appeals of excessive bail where there is "clear abuse of discretion" "would not open the floodgates to a multitude of trivial disputes." 342 U.S. at 13. See also *Richardson* v. *United States*, 468 U.S. 317, 322 (1984) (observing that summary procedures to dispose of insubstantial appeals "provide adequate insurance"); *Abney* v. *United States*, *supra*, 431 U.S. at 662 n.8 (same).

(b) *If Petitioner's Appeal Could Be Rejected, Mandamus Should Have Been Granted.*

Respondent now says that § 1292(b) certification[24] or "extraordinary writs under 28 U.S.C. § 1651 are the appropriate vehicles for dealing with such excesses." Resp. Br. 37. In fact, petitioner *did* alternatively seek mandamus from the Court of Appeals, J.A. 229, and respondent opposed it. J.A. 232-33. If mandamus was appropriate in these circumstances in lieu of appeal, *cf. Stringfellow* v. *Concerned Neighbors*, 107 S. Ct. 1177, 1186 (Brennan, J., concurring); *but cf. Helstoski* v. *Meanor*, 442 U.S. 500 (1979), then the appropriate disposition would be to remand to the Ninth Circuit for

[24] In an off-the-record status conference the district court advised, while refusing to explain any of the rulings it announced it would make, that any § 1292(b) motion asking to certify the rulings would be denied.

consideration under 28 U.S.C. § 1651 or, the record being clear enough, to reverse and direct entry of an appropriate order to the District Court.[25]

2. **Forum Non Conveniens *Criteria Are Not "Enmeshed" With the Merits.***

Contrary to respondent's assertion, Resp. Br. 34, a *forum non conveniens* motion does *not* depend on a showing of prejudice of the sort that can be evaluated only after trial.[26] *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). It is, however, a right that trial destroys. Determination of proper forum is an issue that has been held in less compelling contexts to meet the *Cohen* standards for appeal. See *General Engineering Corp.* v. *Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986) (order denying enforcement of forum selection clause); *cf. Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963) (order denying claim of improper venue is appealable under § 1257).[27]

[25] Mandamus is also appropriate to correct unwarranted judicial actions that threaten "to embarrass the executive arm of the Government in conducting foreign relations." *Ex parte Peru*, 318 U.S. 578, 588 (1943).

[26] The only authority respondent cites for that assertion, Resp. Br. 34, is a footnote in *Williams* v. *Green Bay & W.R.R.*, 326 U.S. 549, 554 n.4 (1946), that describes the law of England and Scotland. Yet on this basis, respondent argues that Judge Wilkey in *Nalls* v. *Rolls-Royce Ltd.*, *infra*, was wrong.

[27] To allow appeals under § 1291 of orders keeping cases for trial in the United States does not at all imply the same for motions to transfer venue to a different federal district under 28 U.S.C. § 1404(a). Such transfer within the federal system involves far lesser stakes and far greater discretion. See, *e.g.*, *Norwood* v. *Kirkpatrick*, 394 U.S. 29, 32 (1955). *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255, 260-61 (D.C. Cir.) (opinion of Wilkey, J.), *cert. denied*, 461 U.S. 970 (1983). Contrary to what he claims, Resp. Br. 32 n.20, of the four cases respondent cites as "post-trial reversals" of pretrial denials of § 1404(a) motions, in one no trial had occurred at all, in another the order was prospective because a new trial had been ordered on other grounds, and the other two cases involved

3. *Post-Trial Review Is Not a Realistic Alternative.*

(a) *Respondent Rejects Practicality.*

Respondent's approach to the *forum non conveniens* issue is irreconcilable with the common-sense practicality of *Cohen*, which called for "a practical rather than a technical construction," 337 U.S. at 546, and explained that appeal was proper if after trial

> "it will be *too late effectively* to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, *probably* irreparably." *Ibid.* (emphasis supplied).

See also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 ("*effectively* unreviewable on appeal from a final judgment") (emphasis supplied).

Respondent now urges something different. He wants to eliminate the word "effectively" from the *Cohen* vocabulary, and along with it to forget the pragmatic realism that *Cohen* and the cases following it embody. Respondent says that *Cohen* should apply "only" if "literally" the denial of pretrial review "would render impossible any review whatsoever." Resp. Br. 31. He argues that "[i]t *should mean literally*, as it has since *Stack* v. *Boyle*, that the right *cannot be reviewed after trial* . . ." Resp. Br. 33 (emphasis supplied; footnote omitted).

Yet even in the Nineteenth Century this Court held that the finality requirement is not "strict and technical," but rather should be interpreted in a "reasonable" way. *Forgay* v. *Conrad*, 6 How. 201, 203 (1848). This Court later through Justice Frankfurter emphasized that pretrial review is entirely appropriate when to deny it "would *practically* defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940) (emphasis supplied). As the same Justice later again explained *Cohen*, "the procedural aspects of law deal with the practical affairs of men and do not constitute

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only personal jurisdiction and were decided thirty years or more before § 1404(a) was enacted.

an abstract system of doctrinaire notions." *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). The very literalism respondent proposes was rejected by the District of Columbia Circuit in holding that a denial of a claim of witness immunity was appealable:

> "the question is preserved in the record and will be available for review upon appeal of any final judgment in the action. This is *literally* true, of course, but for that matter, so would the double jeopardy claim in *Abney* . . . ." *Briggs* v. *Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (emphasis supplied).

(b) *The Protection Is Against Trial.*

Forum non conveniens is a claim that trial should not occur in a U.S. court. If trial occurs, even if the defendant wins, all the interests *forum non conviens* protects still have been lost. And if, like petitioner, he or she is simply unable to bear the expense of attempting to defend civil litigation in a distant forum, and an adverse judgment is entered, the harm is all the greater.[28] Respondent's literalism ignores that with respect to a protection from being tried, "ripeness is all."[29]

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[28] Petitioner appeared specially and appealed, but never entered a general appearance. J.A. 118, 221. The District Court, if it could decide the case while the appeal was pending, should have entered a default judgment rather than an *ex parte* summary judgment that invalidly purported to decide the merits. (Respondent's argument about piecemeal litigation ignores that there were no other pieces. Of the other defendants, one defaulted, one effectively did so, and the others were never served. Also, contrary to his assertion, Resp. Br. 47 *none* of them was a "local resident." J.A. 113.) Petitioner's plight in being unable to defend reflects one of the very kinds of injustice the immunity and *forum non conveniens* are designed to avoid.

[29] Even post-trial, a court still would have to make assumptions about witnesses and evidence never heard as a result of unavailability, or defenses not pursued because of expense the foreign defendant, as here, simply could not bear.

B. Review Will Not Trouble the Courts of Appeals.

Respondent paints a picture of several courts of appeals adamantly opposed to pretrial review of *forum non conveniens* denials. The reality is far more mixed. The Courts of Appeals have simply, with often stated misgivings, been trying to construe *Cohen*.

The thoughtful opinion of Judge Wilkey, arguing that such review fits a *Cohen* analysis, has been widely respected, and was even endorsed by Justice Powell. *Nalls* v. *Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 461 U.S. 970 (1983). One circuit, the Fourth, which relying on Judge Wilkey's analysis has permitted such appeals for several years, has not been flooded; in fact, only two such Fourth Circuit cases are reported. See Pet. Br. 38. The Fifth Circuit has lamented the absence of pretrial review in that circuit and urged that district courts get around it by certifying such orders. See Pet. Br. 32-33 nn. 38, 40.[30] The issue is truly open.

CONCLUSION

For the reasons stated here and in petitioner's opening brief, the judgment should be reversed.

Respectfully submitted,

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[30] Respondent predicts that district judges will seek to keep their dockets clear and so will not hesitate to dismiss foreign-centered cases. Resp. Br. 36-37. It would be no less logical, however, to speculate that some district judges would seek to avoid potential reversal, so that if a dismissal for *forum non conveniens* is immediately appealable, but a denial of such a motion is not and will almost surely never be reviewed, then to that extent denials might be encouraged and, with them, U.S. litigation.